SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.

AMERICAN POWER & LIGHT COMPANY,
PETITIONER,

vs.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 9, 1944.

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fol. 1]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 3966

AMERICAN POWER & LIGHT COMPANY, Petitioner,

against

SECURITIES AND EXCHANGE COMMISSION, Respondent

PETITION OF AMERICAN POWER & LIGHT COMPANY FOR REVIEW OF ORDERS OF THE SECURITIES AND EXCHANGE COMMISSION

(Filed February 5, 1944)

To the United States Circuit Court of Appeals for the First Circuit and the Honorable Judges thereof:

The petition of American Power & Light Company respectfully shows to this Court as follows:

(1) Your petitioner is a corporation organized and existing under the laws of the State of Maine where it has its principal corporate office.

(2) Your petitioner being aggrieved by certain orders of the Securities and Exchange Commission (hereinafter called the "Commission"), dated December 28, 1943 and January 12, 1944, respectively, files this petition under Section 24(a) of the Public Utility Holding Company Act of 1935 (hereinafter called the "Act") 15 U. S. C. A., Sec. 79, [fol. 2] to review and set aside the portions of said orders hereinafter specified. A copy of the order dated December 28, 1943 is annexed to this petition as Appendix A, and a copy of the order dated January 12, 1944 is annexed to this petition as Appendix B.

(3) The nature of the proceedings before the Commission, which resulted in the orders of which review is hereby sought, was as follows:

On July 10, 1941, the Commission issued a Notice and Order for Hearing against Florida Power & Light Company (hereinafter sometimes called "Florida"), your petitioner and Electric Bond and Share Company. In

that Notice and Order the Commission stated that at the hearing particular attention would be directed to certain matters and questions, including the necessity or propriety of requiring Florida to restate its plant and investment, surplus, capital and other accounts, pursuant to Section 15(f) of the Public Utility Holding Company Act of 1935.

On September 17, 1941, Florida and your petitioner, the holder of all of Florida's voting stock, filed with the Commission declarations and applications (File No. 70-403) proposing the refinancing of Florida's 5% First Mortgage Bonds and $7 Preferred Stock through the issuance of new mortgage bonds in an amount less than such 5% First Mortgage Bonds then outstanding and an approximately equal amount of new preferred stock, bearing lesser interest and dividend obligations, respectively.

In connection with, and in furtherance of the proposed refinancing, your petitioner offered to make substantial contributions to the capital of Florida.

The Commission ordered a consolidated hearing on all of the aforesaid matters which was held commencing on September 22, 1941 and which continued to July [fol. 3] 16, 1942 after which Requests for Findings and Conclusions and Briefs were filed and exchanged among counsel.

On December 7, 1943, your petitioner and Florida filed amendments to the applications and declarations previously filed, proposing a refinancing of Florida, restatement of plant, capital, surplus and certain reserve accounts by Florida, such restatement to be made possible in large part through capital contributions by your petitioner varying in amount and detail from those originally offered. The record was reopened, hearings held and the refinancing of Florida accomplished pursuant to the order of December 28, 1943. The Commission, however, by said order imposed upon Florida requirements with respect to the restatement and adjustment of its capital accounts additional to those offered by petitioner and Florida, to wit:

(1) by paragraph (2) of the Commission's order of December 28, 1943, reading as follows:

"It is further ordered that Florida Power & Light Company shall classify in Account 107 and eliminate from the plant account by charge to earned surplus not later than December 31, 1944, an amount of $1,815,655 consisting of capitalized intra-system profits paid to affiliated companies as construction and engineering fees;"

(2) by paragraph (4) of the Commission's order of December 28, 1943, reading as follows:

"It is further ordered that pending final determination of the amount and disposition to be made of Account 100.5 items presently in the plant account of Florida, Florida shall annually beginning with the calendar year 1944 appropriate out of earned surplus to a contingency reserve at least $700,000, such act of appropriation to be without prejudice, however, to respondents' right to contest the validity of any definitive order with respect to such items as may ultimately be issued;"

[fol. 4] These requirements were expressly made separable from the remainder of the order so as to permit separate judicial review thereof.

Your petitioner, the owner of all the common stock of Florida, was a party to and actively participated in every phase of the proceedings before the Commission above mentioned and on January 3, 1944, within the time prescribed by the rules of the Commission, petitioner and Florida filed jointly an application for rehearing of these paragraphs and provisions of said order of December 28, 1943, and on January 12, 1944 the Commission entered its order denying said petition for rehearing.

Petitioner is aggrieved by these said paragraphs of said order of December 28, 1943 and by the denial of the rehearing by said order of January 12, 1944.

(4) The jurisdiction of this Court is invoked under Section 24(a) of the Act, U. S. C. A., Sec. 79.

Your petitioner resides in the State of Maine, which is within the First Judicial Circuit.

(5) The objections of your petitioner to the orders of the Commission of which review is hereby sought are as follows:

(a) Insofar as the portions of the orders, review of which is sought, are purportedly grounded on Sections 15(f) and 20(a) of the Act,

(i) they are unauthorized and beyond the powers conferred upon the Commission by the Act;

(ii) they are unauthorized and beyond the powers conferred upon the Commission by the Act in that they seek to apply retroactively accounting standards not set forth either prospectively or retroactively in the Act and seek to extend the Commission's asserted authority retroactively to the elimination from Florida's ac- [fol. 5] counts of asset items lawfully established in such accounts long prior to the time when the Commission was granted any authority whatever with respect to such accounts;

(iii) they are unauthorized in that they do not constitute the exercise of any power necessarily incidental to the carrying out of any other power expressly conferred upon the Commission and applicable to the rights or interests of your petitioner;

(iv) they constitute an attempt to exercise powers non-existent in the Federal Government in that Florida's operations and the accounts reflecting them are matters not involving interstate or foreign commerce;

(v) they have the effect of restricting the payment to your petitioner of dividends out of Florida's surplus, whereas the Commission has no lawful authority over the declaration and payment of dividends and, in any event, may not disregard and fail to consider, in this connection, the nature of Florida's existing assets; and

(vi) they have the effect of requiring your petitioner, through enforced foregoing of dividends, to pay again for a substantial portion of its interest in Florida, already admittedly paid for by American, whereas the Commission is without power to require such payment;

(b) Sections 15(f) and 20(a) of the Act, and the orders, review of which is sought, are unconstitutional and void in that

(i) Neither Section 15(f) nor 20(a) is a regulation of commerce, nor on the subject of bankruptcies, nor for the establishment of post offices and post roads, within the meaning of the applicable clauses of Article I, Section 8 of the Constitution of the United States, nor within any other power vested in the Congress by said Constitution, but each such section is an invasion of the [fol. 6] powers reserved to the states or the people within the meaning of Article X of the Amendments to the Constitution of the United States in that it seeks to interfere with and control corporations established under State laws, and the exercise by them of their charter powers;

(ii) The enforcement of Section 15(f) and Section 20(a) and of orders made by the Commission thereunder preventing realization by your petitioner of earnings of Florida lawfully available to it as return on funds invested by it in Florida deprive your petitioner of property without due process of law in violation of Article V of the Amendments to the Constitution of the United States; and

(iii) Sections 15(f) and 20(a) of the Act constitute delegations of legislative power to the Commission to formulate and prescribe accounting systems having substantive effects on those to whom they are applied without legislative prescription of standards or definitions confining and directing the Commission in the formulation and prescription of those systems, thus violating Sections 1 and 8 of Article I of the Constitution of the United States; and

(iv) The enforcement of the orders complained of, of Sections 15(f) and 20(a) of the Act, and of related provisions of the Act, deprive petitioner of its property without due process of law in violation of Article V of the Amendments to the Constitution of the United States, constitute delegations of legislative power in violation of Sections 1 and 8 of Article I of the Constitution of the United States, take property for public use without compensation in violation of Article V of

the Amendments to the Constitution of the United States, and constitute ex post facto laws and orders in violation of Section 9 of Article I of the Constitution of the United States.

[fol. 7] (c) Each of the portions of the order, review of which is sought, is arbitrary and capricious and the order and proceedings take petitioner's property without due process of law in violation of Article V of the Amendments to the Constitution of the United States because the evidence in the record shows without contradiction

(i) that the items ordered classified in Account 100.5 (for the elimination of which Florida is required to set aside out of surplus the sum of $700,000 per year) represent payments by your petitioner or by Florida at arm's-length for valuable considerations received by them;

(ii) that the items ordered classified in Account 107 and eliminated represent payments by Florida for value received;

(iii) that the items ordered classified in Account 107 and eliminated were never paid to or received by your petitioner, which is now required by said order to provide for their elimination through foregoing return on its investment;

(iv) that the items ordered classified in Account 107 and eliminated represent fair and reasonable payment for the construction and engineering services received by Florida;

(d) Each of the portions of the order, review of which is sought, is arbitrary and capricious and the order and proceedings take petitioner's property without due process of law in violation of Article V of the Amendments to the Constitution of the United States because there is no evidence in the record

(i) that the items ordered classified in Account 100.5 (for the elimination of which Florida is required to set aside out of surplus the sum of $700,000 per year) [fol. 8] do not represent payments by your petitioner or by Florida at arm's-length for valuable considerations received by them;

(ii) that the items ordered classified in Account 100.5 (for the elimination of which Florida is required to set aside out of surplus the sum of $700,000 per year) are not represented by assets having a value to Florida equal to or greater than the amounts ordered eliminated;

(iii) that the items ordered classified in Account 107 and eliminated do not truly represent payments by Florida for value received;

(iv) that the items ordered classified in Account 107 and eliminated were ever paid to your petitioner, which is now required by said order to provide for their elimination through foregoing return on its investment;

(v) that the items ordered classified in Account 107 and eliminated do not represent fair and reasonable payment for the construction and engineering services received by Florida;

(e) The evidence in the record with respect to the items ordered classified in Account 107 and eliminated is insufficient to support such an order or administrative findings which would form the basis for such an order;

(f) The evidence in the record with respect to the items ordered classified in Account 100.5 and eliminated is insufficient to support such an order or administrative findings which would form the basis for such an order; and

(g) The evidence in the record is insufficient to support the requirement of the orders that Florida, annually beginning with the calendar year 1944, appropriate out of earned surplus to a contingency reserve, at least $700,000.

[fol. 9] Wherefore, your petitioner, American Power & Light Company, respectfully prays (a) that this Honorable Court take jurisdiction over the parties and the subject matter of this petition, (b) that a copy hereof be served upon the respondent Commission, as prescribed by law, (c) that this Honorable Court review paragraphs numbered 2 and 4 of the order of the respondent Commission dated December 28, 1943 and the order of respondent Commission dated January 12, 1944, denying rehearing, respectively, and upon such review set aside the portions of the

said order of December 28, 1943 above specified and the order of January 12, 1944, and (d) that this Honorable Court grant your petitioner such other and further relief as may be deemed just and proper in the premises.

Respectfully submitted, American Power & Light Company. By L. H. Parkhurst, Vice-President.
Attest: D. W. Jack, Secretary (Corporate Seal).
Dated: February 3, 1944.

Reid & Priest, 2 Rector Street New York 6, N. Y.
Attorneys for Petitioner.
A. J. G. Priest, R. A. Henderson, Of Counsel.

[fol. 10] *Duly sworn to by L. H. Parkhurst. Jurat omitted in printing.*

[fol. 11] APPENDIX A TO PETITION

United States of America Before the Securities and Exchange Commission

At a regular session of the Securities and Exchange Commission, held at its office in the City of Philadelphia, Pennsylvania, on the 28th day of December, A. D., 1943.

In the Matter of FLORIDA POWER & LIGHT COMPANY, AMERICAN Power & Light Company, Electric Bond and Share Company. File No. 59-26. Florida Power & Light Company, American Power & Light Company. File No. 70-403. (Public Utility Holding Company Act of 1935).

ORDER

The Commission having instituted proceedings under Sections 11 (b) (2), 12 (b), 12 (c), 12 (f) and 15 (f) of the Public Utility Holding Company Act of 1935 directed to Florida Power & Light Company, an electric and gas utility, its corporate parent, American Power & Light Company, a registered holding company, and Electric Bond and Share Company, also a registered holding company, raising issues therein as to: the existence of substantial write-ups in the plant account; the adequacy of the reserve for retirements and depreciation; the necessity for stopping dividends on preferred and common stocks held by American,

and interest on the debentures owned by American; the ex-
[fol. 12] istence of an unfair and inequitable distribution of voting power among its various classes of security holders, the steps necessary to cure such inequities, if found to exist, including subordination to publicly-held securities of American Power & Light Company's holdings of Florida Power & Light Company's preferred stock and debentures; and the treatment to be afforded certain sums received by American Power & Light Company from Florida Power & Light Company on or about July 1, 1941 as dividends on preferred stock; and

Florida Power & Light Company and American Power & Light Company having filed joint applications and declarations with amendments thereto under Sections 6, 7, 9, 10 and 12 of said Act relating to: the issuance and sale by Florida Power & Light Company to the public of $45,000,000 principal amount of first mortgage bonds and $10,000,000 principal amount of sinking fund debentures pursuant to the competitive bidding requirements of Rule U-50 under the said Act; the issuance and sale of $5,000,000 principal amount of serial notes to certain banks and institutions; the issuance of $5,000,000 principal amount of sinking fund debentures to American Power & Light Company in exchange for $5,000,000 debentures presently held by that company; the surrender by American Power & Light Company to Florida Power & Light Company, as a capital contribution to the latter company, of $17,000,000 principal amount of the debentures, 13,477 shares of the $7 preferred stock, 10,000 shares of the $6 preferred stock, and 20,000 shares of the second preferred stock of the latter company; and the transfer by American Power & Light Company, as a capital contribution to Florida Power & Light Company, of the notes, open account indebtedness, and capital stock of Utilities Land Company (a wholly-owned subsidiary of American Power & Light Company); and these proceedings by Order having been consolidated with the aforesaid proceedings instituted by the Commission; and

[fol. 13] Samuel Okin having filed a request for leave to intervene in the above consolidated proceedings and having requested oral argument and permission to file a brief therein, and having been granted limited participation by the trial examiner; and

Public hearings having been held after appropriate notice and the Commission having considered the record and having made and filed its Findings and Opinion herein;

(1) It is Hereby Ordered pursuant to Sections 15(f) and 20(a) of the Public Utility Holding Company Act of 1935 that Florida Power & Light Company shall make upon its books of account the following adjustments:

(a) Florida shall, by appropriation from earned surplus (including earned surplus made available by transfer from insurance reserve), increase its reserve for property retirements in the amount of $2,400,000 as proposed by Florida;

(b) Florida shall, by charge to earned surplus, eliminate from its plant account the known system write-up therein in the amount of $27,615,043.91;

(c) Florida shall, by charge to earned surplus, eliminate from its plant account interest on excess capacity capitalized therein in the amount of $1,888,067.20;

(d) Florida shall, by charge to earned surplus, eliminate from its plant account capital stock expense capitalized therein in the amount of $114,728.00;

(2) It is Further Ordered that Florida Power & Light Company shall classify in Account 107 and eliminate from the plant account by charge to earned surplus not later than December 31, 1944, an amount of $1,815,655 consisting of capitalized intra-system profits paid to affiliated companies as construction and engineering fees;

[fol. 14] (3) It is Further Ordered that Florida Power & Light Company, as a provision for the disposition of the capitalized intra-system profits ordered in paragraph (2) above to be classified in Account 107 and eliminated from the plant account by charging to earned surplus, shall each month during the calendar year 1944 retain out of, and shall restrict, earned surplus in an amount of not less than one-twelfth (1/12) of $1,815,655 until such time as a total of $1,815,655 shall have been retained and restricted and shall indicate by appropriate footnotes to all published financial statements that its earned surpus is subject to that restriction; compliance with such order so

restricting surplus to be without prejudice to respondents' right to contest the classification of said $1,815,655 in Account 107 and the elimination of such item;

(4) It is Further Ordered that pending final determination of the amount and disposition to be made of Account 100.5 items presently in the plant account of Florida, Florida shall annually beginning with the calendar year 1944 appropriate out of earned surpus to a contingency reserve at least $700,000, such act of appropriation to be without prejudice, however, to respondents' right to contest the validity of any definitive order with respect to such items as may ultimately be issued;

(5) It is Further Ordered that the provisions of paragraphs (2), (3) and (4) above shall be deemed severable from the remaining portions of this order and shall not be deemed conditions to the granting of the applications and the effectiveness of the declarations with respect to the transactions proposed by applicants-declarants which are approved in paragraph (6) hereof;

(6) It is Further Ordered that said applications, as amended, be, and hereby are, granted, and said declarations, as amended, subject to Commission approval by fur- [fol. 15] ther order of the terms of the bond and debenture financing which shall be determined by competitive bidding, and subject to Commission approval by further order of the terms of the serial note issue to be supplied by amendment, be and hereby are, permitted to become effective forthwith, all subject to the terms and conditions contained in Rule U-24, and subject to the further condition that prior to or concurrently with the final closing with respect to the sale of the proposed bonds and debentures American Power & Light Company shall have made the proposed capital contributions to Florida Power & Light Company and Florida Power & Light Company shall have made upon its books of account the accounting adjustments proposed by it and hereinbefore ordered by us to be made in paragraph (1), sub-paragraphs (a), (b), (c) and (d) above.

(7) It is Further Ordered that jurisdiction be, and hereby is, reserved over all fees, commissions, or other remunerations to be paid in connection with the said joint applications and declarations;

(8) It is Further Ordered that the restriction contained in our Order of July 10, 1941, which required American Power & Light Company to retain in a special account the dividends received on or about July 1, 1941 on its holdings of Florida's $7 and $6 preferred stock, is hereby terminated; and

(9) It is Further Ordered that the requests of Samuel Okin for leave to intervene, for oral argument, and for permission to file a brief be, and hereby are, denied.

By the Commission.

Orval L. DuBois, Secretary. (Seal.)

[fol. 16] APPENDIX "B" TO PETITION

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

At a regular session of the Securities and Exchange Commission, held at its office in the City of Philadelphia, Pennsylvania, on the 12th day of January, A. D., 1944

In the Matter of FLORIDA POWER & LIGHT COMPANY, AMERICAN POWER & LIGHT COMPANY, ELECTRIC BOND AND SHARE COMPANY

File No. 59-26

FLORIDA POWER & LIGHT COMPANY, AMERICAN POWER & LIGHT COMPANY

File No. 70-403

(Public Utility Holding Company Act of 1935)

ORDER DENYING REHEARING

The Commission having issued its order herein dated December 28, 1943 (Holding Company Act Release No. 4791) granting applications and permitting declarations to become effective with respect to a proposed recapitalization of Florida Power & Light Company, and approving certain accounting entries to be made on the books of said company;

The Commission by said order having also directed Florida Power & Light Company:

[fol. 17] (a) To classify $1,815,655 in Account No. 107 and to eliminate the same from plant account by charge to earned surplus not later than December 31, 1944; and

(b) To appropriate out of earned surplus a contingency reserve of at least $700,000 annually, pending final determination of the amount and disposition to be made of Account No. 100.5 items presently in the plant account;

The Commission having provided in said order that the requirements described in paragraphs (a) and (b) above should be severable from the remaining portions of said order and should not be deemed conditions to the granting of the applications and the effectiveness of the declarations regarding the transactions approved in said order;

Florida Power & Light Company and American Power & Light Company having filed herein their petition for rehearing with respect to the matter described in paragraphs (a) and (b) above, which petition raises no questions which were not fully considered by the Commission when it formulated its findings and opinion accompanying its aforesaid order; and

It appearing to the Commission that no useful purpose would be served by having a rehearing with respect to the matters in question, it is

Ordered that the aforesaid petition for rehearing be and it hereby is denied.

By the Commission.

Orval L. DuBois, Secretary. (Seal.)

[fol. 18] In United States Circuit Court of Appeals

Minute Entries

On the same day, to wit, February 5, 1944, notice of the filing and a copy of said petition were duly mailed to the respondent, Securities and Exchange Commission.

Thereafter, to wit, on February 10, 1944, acknowledgment of service by counsel for the respondent of the notice of filing of the petition was received and filed.

[fol. 19] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 3966

[Title omitted]

MOTION OF RESPONDENT TO DISMISS PETITION FOR REVIEW—
Filed Feb. 24, 1944

To the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit:

Respondent Securities and Exchange Commission moves this Court to dismiss the petition for review in the above-entitled cause for the reason that it appears from the face of the petition that petitioner is not a "person aggrieved" within the meaning of the provision of Section 24(a) of the Public Utility Holding Company Act of 1935 which is relied on for the Court's jurisdiction.

The Commission does not challenge the right of petitioner's subsidiary Florida Power & Light Company to seek review of this order, which is specifically directed to it. As indicated in paragraph (5) of the Commission's order, those paragraphs of the order which petitioner seeks to review were expressly made severable from certain provisions relating to a refinancing program for Florida. The purpose was to permit consummation of the refinancing without precluding review of the paragraphs specified. Since the question we are raising goes to the jurisdiction [fol. 20] of this Court, and is one which a reviewing court would raise on its own motion, we believe that we should raise it at the outset, by a motion to dismiss. We have given notice of our motion to petitioner in ample time for it to cause its subsidiary to file its petition for review in an appropriate circuit. Oral argument is requested, and since this is a motion which should be disposed of prior to the filing of the transcript, it is respectfully urged that the Court set the motion for argument at the earliest possible date.

As grounds for this motion, respondent respectfully shows:

1. As appears from the order of the respondent, appended to the petition for review, the order in question neither orders petitioner to do anything nor to

refrain from doing anything, and said order does not in any manner operate directly upon petitioner (except that paragraph (8) thereof, not sought to be reviewed, relieved petitioner of a requirement imposed by an earlier order of the respondent; and except that paragraph (6) of the order, not sought to be reviewed, *granted* certain applications and declarations filed by the petitioner).

2. As appears on the face of the petition, the only respect in which petitioner is concerned with paragraphs (2) and (4) of the order (the only paragraphs sought to be reviewed) is by virtue of petitioner's position as owner of all of the stock of Florida Power & Light Company, against which company paragraphs (2) and (4) of the order are directed.

3. Petitioner, as the sole stockholder of Florida Power & Light Company, is not entitled to obtain review of the order of respondent directed to Florida Power & Light Company and is not "aggrieved" thereby merely because in the judgment of petitioner that order may adversely affect the value of petitioner's interest in Florida Power & Light Company. It appears from the face of the petition, and particularly from the objections of the petitioner to the order, that the respects in which the order is complained of all relate to the power of the respondent to make orders with respect to the books and accounts of Florida [fol. 21] Power & Light Company, and to the propriety of the order in so far as the required entries on the books of Florida Power & Light Company are deemed by petitioner to be adverse to the interests of Florida Power & Light Company and to petitioner as a stockholder thereof. None of them relates to any direct concern of petitioner with the order of the respondent.

4. Obviously, a reversal of the order on petitioner's petition would be meaningless unless the effect of the reversal was to relieve Florida Power & Light Co. from the necessity of complying with the order. Therefore, the petition necessarily seeks review of the order in so far as the order is directed against Florida Power & Light Company. But it has not been shown that Florida Power & Light Co. cannot file a petition

for review in its own behalf, or that it will not do so, or that its interests with respect to the order are in any manner in conflict with those of petitioner.

The grounds for respondent's motion to dismiss are more fully stated in a supporting brief appended hereto.

[fol. 22] IN UNITED STATES CIRCUIT COURT OF APPEALS

MINUTE ENTRY

Thereafter, to wit, on April 5, 1944, this cause came on to be heard upon the motion to dismiss,—no transcript having been filed,—and was heard by the Court, Honorable Calvert Magruder, Honorable John C. Mahoney, and Honorable Peter Woodbury, Circuit Judges, sitting.

[fol. 23] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

OPINION ON MOTION TO DISMISS PETITION FOR REVIEW—Filed June 19, 1944

MAGRUDER, J.:

This case is now before us on respondent's motion to dismiss a petition filed in this court by American Power & Light Company under § 24(a) of the Public Utility Holding Company Act of 1935 (49 Stat. 834) to review portions of an order of the Securities and Exchange Commission.
[fol. 24] The Commission on July 10, 1941, instituted proceedings under §§ 11(b)(2), 12(b)(c) and (f) and 15(f) of the Act against Florida Power & Light Company, American Power & Light Company (the present petitioner) and Electric Bond & Share Company. Florida is a public utility company incorporated in the state of Florida and is engaged in the business of supplying electricity and gas to a large number of communities in that state. All the common stock of Florida is held by American, a registered holding company incorporated in the state of Maine. American in turn is controlled by Bond & Share as the top holding company.

The proceedings raised issues as to the existence of substantial write-ups in the plant account of Florida; the adequacy of its depreciation reserve; the necessity for stopping dividends on preferred and common stocks held by American and interest on the debentures owned by American; the existence of an unfair and inequitable distribution of voting power among Florida's various classes of securities and security holders; the steps necessary to cure such inequities, if found to exist, including subordination to publicly held securities of holdings by American of Florida's preferred stock and debentures; and the treatment to be accorded certain sums received by American from Florida on or about July 1, 1941, as dividends on preferred stocks.

By way of partial answer to the matters complained of by the Commission, Florida and American filed joint applications, and subsequent amendments thereto, seeking approval of proposals for recapitalization and refinancing of Florida involving, among other things, certain alterations in the securities of Florida held by American. By order of the Commission these applications were consolidated for hearing with the aforesaid proceedings which had been instituted by the Commission.

On December 28, 1943, the Commission filed its findings, opinion and order in the consolidated proceedings. The [fol. 25] order granted the applications of Florida and American for approval of their proposals for the recapitalization and refinancing of Florida. Except insofar as it granted such applications, the order required no changes in Florida's capital structure or in American's holdings of Florida's securities.

The order did, however, in paragraphs 2 and 4, direct Florida to make certain accounting entries relating to matters not covered by the proposals contained in the applications which had been filed by Florida and American. These two paragraphs of the order are the only ones which American seeks now to have us review in the pending petition. These paragraphs of the order read as follows:

"(2) It is further ordered that Florida Power & Light Company shall classify in Account 107 and eliminate from the plant account by charge to earned surplus not later than December 31, 1944, an amount of $1,815,655 consisting of capitalized intra-system profits paid to affiliated companies as construction and engineering fees; * * *

"(4) It is further ordered that pending final determination of the amount and disposition to be made of Account 100.5 items presently in the plant account of Florida, Florida shall annually beginning with the calendar year 1944 appropriate out of earned surplus to a contingency reserve at least $700,000, such act of appropriation to be without prejudice, however to respondents' right to contest the validity of any definitive order with respect to such items as may ultimately be issued; * * *"

Paragraph 2 of the order, above quoted, relates to certain engineering and construction fees capitalized by Florida in its plant account and paid to Phoenix Utility Company, a wholly owned construction subsidiary of Bond & Share, in connection with the construction of interconnections and additional generating facilities.

Paragraph 4 of the order, above quoted, was based on the fact that American had paid a greater sum for the properties transferred by it to Florida at the latter's organization [fol. 26] than the original cost of those properties to the persons who had first devoted them to public service. The object of the Commission's order was to require Florida ultimately to value the properties transferred to it by American on the basis of the original cost of those properties to such persons. The same object was sought by the Commission with respect to those properties purchased by Florida itself after organization.[1] It was indicated that the adjustment on account of these two items might exceed $10,000,000. With reference to this matter, the Commission stated in its opinion:

"We are cognizant, however, of the fact that the exact amount includible in Account 100.5 has not been finally established and will not be until the original cost study of the company is completed and has been reviewed by us. We believe that in the interests of orderly procedure, the company should be afforded an opportunity to complete its study and to have that study reviewed by us before we take definitive action either with respect to classification in the

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[1] See Kripke, A Case Study in the Relationship of Law and Accounting: Uniform Accounts 100.5 and 107, 57 Harv. L. Rev. 433 (April, 1944); see also *Pacific Power & Light Co.* v. *Federal Power Commission*, 141 F. (2d) 602 (C. C. A. 9th, 1944).

appropriate account or with respect to a formal program of disposition. However, since all present indications are that there will be approximately $10,500,000 of such acquisition adjustments ultimately to be disposed of, conservative accounting requires that the company should begin now to make provision for such disposition. We will therefore order (subject to further order of the Commission in connection with the company's original cost study or otherwise) that commencing in 1944, the company annually appropriate out of earned surplus to a contingency reserve, the sum of at least $700,000, such act of appropriation, however, to be without prejudice to its right to contest the validity of such definitive order with respect to the matter as may ultimately be issued."

Section 24 of the Act, under which American seeks to have [fol. 27] this court review paragraphs 2 and 4 of the Commission's order, reads as follows:

"Sec. 24. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. * * *"

Paragraphs 2 and 4 of the order are directed only to Florida; American is not mentioned therein or required to do anything or refrain from doing anything. No doubt Florida is a "party aggrieved", entitled to have the order reviewed in the appropriate circuit court of appeals. In fact, after the Commission filed its motion to dismiss American's petition at abr, Florida filed in the Circuit Court of Appeals for the Fifth Circuit a petition in substantially identical

terms seeking review of paragraphs 2 and 4 of the Commission's order. The Commission contends, in support of its motion to dismiss, that Florida is the only "party aggrieved" by the order, and that American, whose only interest in the matter is derived through its holding of the common stock of Florida, has no independent standing to seek a review of the order pursuant to § 24 (a).

On the other hand, American contends: "While some of the grounds of objection to the Orders complained of are available to both Florida and American, American is the [fol. 28] party entitled to urge that the appropriations from earned surplus required by the Orders will deprive American of dividends from the money so appropriated. Undoubtedly the Commission will contend that Florida cannot complain that American is being deprived of dividends as a result of the Orders." The Commission denies that its motion to dismiss is a procedural manoeuver designed to block the Florida-American interests out of arguments which should be available to them. In its brief the Commission states that it does not contend that "Florida lacks standing to seek judicial review of an order directing the manner in which it shall keep its accounts, and we recognize that among the matters which may properly be considered on such review is the question whether the order improperly interferes with any right of the corporation to pay dividends and of its stockholders to receive them, and with the value of its outstanding securities." This position counsel for the Commission reaffirmed in a most explicit manner at the oral argument before us.

Upon familiar principles of corporation law, whether a corporation shall institute litigation to enforce a corporate right, like other business questions, is ordinarily a matter of internal management left to the discretion of the directors in the absence of instruction by vote of the stockholders. "Courts interfere seldom to control such discretion *intra vires* the corporation, except where the directors are guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relation which prevents an unprejudiced exercise of judgment; and, as a rule, only after application to the stockholders, unless it appears that there was no opportunity for such application, that such application would be futile (as where the wrongdoers control the corporation), or that the delay involved would defeat recovery." *United*

Copper Securities Co. v. *Amalgamated Copper Co.*, 244 [fol. 29] U. S. 261, 263-64 (1917.)[2] The mere fact that the refusal of a corporation, through its management, to engage in litigation, may result in a diminution of dividends to stockholders, does not give a stockholder standing to invoke the aid of a court of equity in overriding the judgment of the management. *Hawes* v. *Oakland*, 104 U. S. 450, 462 (1881).

Consistently with these principles, if the board of directors of Florida had on their own initiative, in good faith and in the exercise of their business judgment, made the accounting changes which paragraphs 2 and 4 of the Commission's order directed Florida to make, a minority stockholder would not have been heard to complain, even though such change resulted in some temporary curtailment of dividends. Whether to contest the Commission's order to this effect is equally a matter of internal corporate management committed in the first instance to the discretion of Florida's board of directors. And, of course, in circumstances like the present, American does not need the aid of a court to compel the assertion of a corporate right, because as controlling stockholder in Florida, American can cause Florida to file a petition for review of the Commission's order.

In *Pittsburgh & West Virginia Ry. Co.* v. *United States*, 281 U. S. 479 (1930), the Interstate Commerce Commission had authorized the New York Central Railroad and other rail carriers to join in establishing a union station at Cleveland through a jointly owned subsidiary. The Wheeling & Lake Erie Railroad had for some years owned and maintained its independent station at Cleveland on the approach [fol. 30] to the union terminal. Wheeling was persuaded to sell its site and become a tenant of the new station at a comparatively low rental, and filed with the Commission an application for authorization to do so. The Pittsburgh & West Virginia Railway, a minority stockholder in Wheel-

[2] This principle is embodied now in Rule 23(b) of the Federal Rules of Civil Procedure. While Rule 23(b) is applicable only to district courts, we see no reason why the accepted principle, which antedated Rule 23(b), should not be applicable to review in the circuit courts of appeals under § 24 (a) of the Public Utility Holding Company Act.

ing, intervened and was heard before the Commission in opposition to the plan on various grounds, one of which was that it might imperil Wheeling's financial condition. The Commission, however, approved the plan, and Pittsburgh brought suit in a three-judge district court under the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 219-20, to suspend and set aside the Commission's order. The District Court denied relief on the merits; upon appeal the Supreme Court held that Pittsburgh had no standing to sue and that the bill should have been dismissed without inquiry into the merits. Justice Brandeis, speaking for the court, said (at p. 487):

"'Finally, the claim that the order threatens the Wheeling's financial stability, and consequently appellant's financial interest as a minority stockholder is not sufficient to show a threat of the legal injury necessary to entitle it to bring a suit to set aside the order. This financial interest does not differ from that of every investor in Wheeling securities or from an investor's interest in any business transaction or lawsuit of his corporation. Unlike orders entered in cases of reorganization, and in some cases of acquisition of control of one carrier by another, the order under attack does not deal with the interests of investors. The injury feared is the indirect harm which may result to every stockholder from harm to the corporation. Such stockholder's interest is clearly insufficient to give the Pittsburgh a standing independently to institute suit to annul this order.''

Pittsburgh & West Virginia Ry. Co. v. *United States* was recently cited with approval in *Boston Towboat Co.* v. *United States,* decided by the Supreme Court April 3, 1944. See also *United Copper Securities Co.* v. *Amalga-*
[fol. 31] *mated Copper Co.,* 244 U. S. 261 (1917); *Westmoreland Asbestos Co., Inc.* v. *Johns-Manville Corp.,* 30 F. Supp. 389 (S. D. N. Y., 1939), affirmed on opinion below, 113 F. (2d) 114 (C. C. A. 2d, 1940); *NY Pa NJ Utilities Co.* v. *Public Service Commission,* 23 F. Supp. 313 (S. D. N. Y. 1938).

It is true that the Urgent Deficiencies Act, under which review of the order of the Interstate Commerce Commission was sought in *Pittsburgh & West Virginia Ry. Co.* v. *United States,* does not provide, as does § 24 (a) of the

Public Utility Holding Company Act, that "any person or party aggrieved" may seek a review of the administrative order, but leaves the moving party's standing to seek review to be determined upon general principles. But the phrase "any person or party aggrieved" is not one of exact meaning; and we have no reason to think that Congress thereby intended to confer upon a stockholder the independent right to seek a review of the type of administrative order, directed only against the corporation, involved in the case at bar. It may be that so far as concerns the constitutional requirement of "case" or "controversy" Congress might have power to disregard the "corporate veil," to treat the controversy as one subsisting between the Commission and the stockholders of the corporation which has been ordered by the Commission to make the accounting changes here involved, and to confer upon such stockholders the independent right, in their own names, to seek review of the Commission's order. But we think it is clear that if Congress had intended any such departure from the ordinary principles of corporation law, it would have expressed such intention in explicit language.

In applying to the case at bar the phrase "any person or party aggrieved," it is immaterial that American was a party to the administrative proceedings before the Commission. *Pittsburgh & West Virginia Ry. Co.* v. *United States*, 281 U. S. 479, 486 (1930); *Alexander Sprunt & Son, Inc.* v. *United States*, 281 U. S. 249, 254-55 (1930). Under § 19 of the Public Utility Holding Company Act, 49 Stat. 832, the Commission has broad discretion in admitting interested persons as parties to the administrative proceedings, but it by no means follows that all persons who properly participate as interested parties in the administrative proceedings are "parties aggrieved" within the meaning of the review provisions in § 24 (a). As a matter of fact, in view of the inclusive nature of the issues projected in the proceedings initiated by the Commission in the present case, American was necessarily made a party respondent, because, among other things, one of the issues raised was whether it was necessary to subordinate to publicly held securities of Florida the holdings by American of Florida's preferred stock and debentures. But so far as concerns paragraphs 2 and 4 of the Commission's order, which are the only portions of the order now sought

to be reviewed, proceedings to that end could have been instituted by the Commission against Florida alone, without joining American as a party respondent.

We shall refer briefly to some of the cases relied upon by petitioner.

In *Northwestern Electric Co.* v. *Federal Power Commission*, 321 U. S. 119 (1944), the Commission made an accounting order against Northwestern Electric Company, an operating utility all of whose common shares are owned by American Power & Light Company. Northwestern filed in the proper circuit court of appeals a petition to review the order. American joined in the application for court review. Since the particular circuit court of appeals undoubtedly had jurisdiction to review the order there was no point in challenging American's standing to join in the petition, and the Commission made no such challenge. Neither in the opinion of the circuit court of appeals nor in that of the Supreme Court was there any discussion [fol. 33] of the question whether American had an independent standing to seek review of the accounting order against the corporation of which it was the controlling stockholder.

In *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470 (1940), one holding a license to operate a broadcasting station, over whose objection the Commission had granted a permit for the erection of a rival station, was held to be a "person aggrieved or whose interests are adversely affected" by the decision of the Commission, within the meaning of § 402 (b)(2) of the Communications Act of 1934, 48 Stat. 1064, 1093, and hence entitled to appeal from the Commission's decision to the Court of Appeals of the District of Columbia. The private economic injury which the said licensee suffered as a result of the Commission's decision was deemed sufficient to give the licensee a standing, as a sort of "private attorney general,"[3] to present questions of public interest and convenience on appeal from the order of the Commission. The court pointed out (at p. 477) that it ascribed this meaning to the flexible phrase "person aggrieved or whose interests are adversely affected" in order to effectuate the

[3] See Douglas, J., dissenting, in *Federal Communications Commission* v. *National Broadcasting Co., Inc.*, 319 U. S. 239, 265, note 1 (1943).

purposes of the particular statute and because, otherwise, § 402 (b) (2) would be deprived of any substantial effect. No comparable situation is presented in the case at bar. Neither in the *Sanders* case, *supra*, nor in the *Federal Communications Commission* v. *National Broadcasting Co., Inc.*, 319 U. S. 239 (1943), nor in *Associated Industries, Inc.* v. *Ickes*, 134 F. (2d) 694 (C. C. A. 2d, 1943), was the question presented whether a stockholder is a "person or party aggrieved" by an accounting order directed solely against the corporation, an order which the corporation is fully empowered to bring for review before the appropriate circuit court of appeals.

[fol. 34] In *Todd* v. *Securities and Exchange Commission*, 137 F. (2d) 475 (C. C. A. 6th, 1943), the standing of a stockholder to seek review of a dissolution order pursuant to § 11 (b) (2) of the Public Utility Holding Company Act was not challenged by the Commission, and the court's decision makes no allusion to the point.

In *Okin* v. *Securities and Exchange Commission*, 137 F. (2d) 398 (C. C. A. 2d, 1943), a stockholder sought review of an order of the Commission granting an application by the corporation for authority to sell the securities of a wholly owned subsidiary. The stockholder had appeared before the Commission in opposition to the application, charging fraud, and after being allowed a limited participation in the hearing, he was eventually ordered by the examiner to leave the room, and upon his refusal the examiner closed the hearing. The court stated that the only question before it was "whether, as petitioner so strenuously asserts, he was denied the essentials of a fair hearing." If the stockholder was entitled to be heard before the Commission on his charges of fraud, and had been denied the essentials of a fair hearing, it may well be that he should be deemed a person aggrieved by the ensuing order of the Commission. The court after examination of the record of the administrative proceedings concluded "that no error which could possibly affect the result occurred" and affirmed the Commission's order.

Finally, the petitioner relies heavily on our decision in *Lawless* v. *Securities and Exchange Commission*, 105 F. (2d) 574 (1939). In that case, as this court understood the Commission's order, its effect was to cast doubt upon the validity of the new common stock and common stock purchase warrants which would be issued to petitioner in

pursuance of a proposed recapitalization. In such a case a minority stockholder whose rights are affected is a person aggrieved by the Commission's order within the meaning [fol. 35] of § 24 (a), and has an independent standing to seek judicial review. Insofar as the language of the *Lawless* opinion may intimate that the petitioner was a "person or party aggrieved" merely by virtue of the fact that he had been admitted to participation in the proceedings before the Commission, we do not think that it is correct.

Respondent's motion to dismiss the petition for review is granted, and the petition is dismissed for lack of jurisdiction.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER—June 19, 1944

This cause came on to be heard April 5, 1944, upon petition for review of an order of the Securities and Exchange Commission, and a motion by respondent to dismiss the petition for review, and was argued by counsel.

Upon consideration whereof, It is now, to wit, June 19, 1944, here ordered as follows: Respondent's motion to dismiss the petition for review is granted, and the petition is dismissed for lack of jurisdiction.

By the Court, (S.) Roger A. Stinchfield, Chief Deputy Clerk.

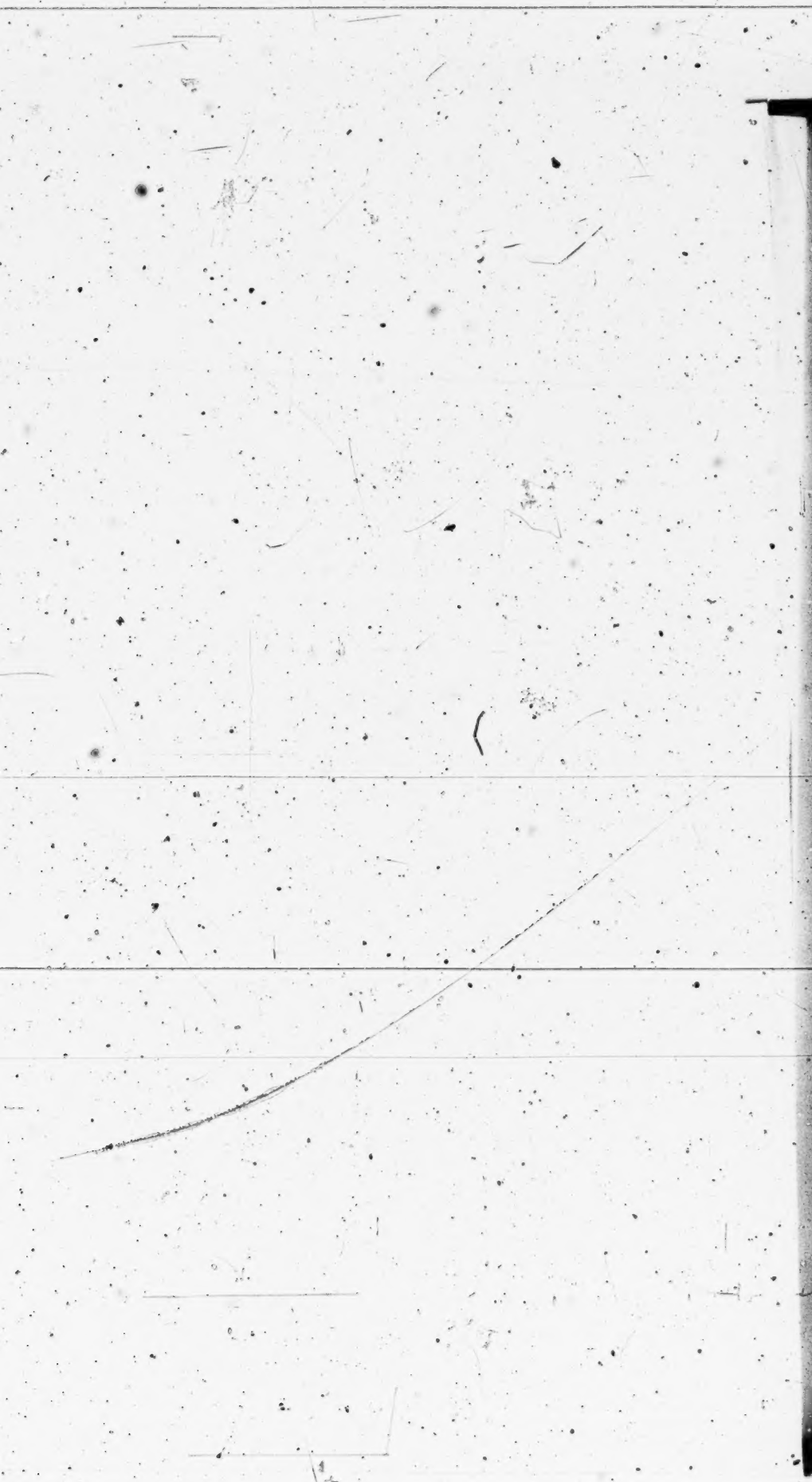
[fol. 36] Clerk's Certificate to transcript omitted in printing.

[fol. 37] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 13, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



Supreme Court of the United States

OCTOBER TERM, 1944.

No. 470

AMERICAN POWER & LIGHT COMPANY,
Petitioner,

against

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

A. J. G. PRIEST,
R. A. HENDERSON,
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New York 5, N. Y.,
Counsel for Petitioner.

September 15, 1944.

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Supreme Court of the United States

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No.....

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SECURITIES AND EXCHANGE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

American Power & Light Company prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the First Circuit to review the decree of that Court entered in the above-entitled cause on June 19, 1944, affirming an order of the Securities and Exchange Commission (hereinafter referred to as the Commission), dated December 28, 1943, and an order of that Commission denying Petitioner's Application for Rehearing, dated January 12, 1944.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 24(a) of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 834-5; 15 U. S. C. §79x(a)) and Section 240(a) of the Judicial Code, as amended (28 U. S. C. §347(a)).

The Opinions Below.

The opinion of the Circuit Court of Appeals for the First Circuit was rendered on June 19, 1944, and is reported at 143 Fed. 2d 250.

The opinion of the Commission rendered December 28, 1943, the order of the same date, and the order denying the Petitioner's Application for Rehearing dated January 12, 1944, have not yet been officially reported. The order of the Commission which forms the basis of this Petition is attached as Appendix A to the Brief annexed hereto.

Statute Involved.

The statute involved is the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. §79), hereinafter referred to as the "Act". The portion of that Act which is directly involved is Section 24(a) thereof (15 U. S. C. §79x(a)), which reads in part as follows:

> "Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. . . ."

Summary Statement.

The Petitioner, a corporation organized under the laws of the State of Maine, registered as a holding company under the Act in 1938.

The Petitioner owns practically all the common stocks and some other securities of 15 corporations which are operating electric (and, in a few instances, gas) public utilities. The Petitioner owns all the common stock of Florida Power & Light Company (hereinafter referred to as "Florida").

Florida is an operating electric and gas utility conducting its business solely in the State of Florida. Florida's capital structure (after full compliance with the order of the Commission, except the two paragraphs therein which are involved in this case and which are declared by the order to be separable from the remainder thereof) consists of $99,000,000 of assets and $65,000,000 of debt and the common stock owned by the Petitioner.

The Commission by its initial order of July 10, 1941, made Petitioner (also sometimes referred to as "American") a party to those proceedings, along with its subsidiary, Florida, and Electric Bond and Share Company. This initial order of the Commission raised issues which included "the necessity for stopping dividends on preferred and common stocks held by American * * *".

On August 8, 1941, after the Commission instituted the proceedings against American and the other two companies, American and the other two companies filed a motion with the Commission in which they proposed a financial reorganization program for Florida, which involved substantial voluntary capital contributions by American to Florida and a refinancing of the bonds and the retirement of the preferred stock of Florida. Later American and Florida filed formal applications in connection with that program.

The Commission consolidated the proceedings instituted by it with proceedings based on the reorganization

program proposed by American and Florida. The Commission made both American and Florida parties to the consolidated proceedings.

Throughout the proceedings, American participated actively through witnesses and counsel, and presented evidence in its behalf. At the hearings in those proceedings and in briefs, American offered contentions which the Commission rejected.

The order of December 28, 1943, in paragraphs separate from the remainder of the order, directed Florida (paragraph 2 of the order annexed hereto as Appendix A herein), first, to take out of its surplus the sum of $1,815,655. It directed Florida to do this (paragraph 3 of the order) by retaining out of earned surplus 1/12 of that sum in each month of 1944. Secondly, it directed Florida to appropriate annually out of surplus (paragraph 4 of the order) the sum of $700,000, until approximately $10,000,000 had been so appropriated.

Petitioner sought review by the Circuit Court of Appeals for the First Circuit of paragraphs 2 and 4 of the order of the Commission (Appendix A) which was issued in proceedings instituted by the Commission.

American, as a result of the reorganization which involved substantial voluntary capital contributions by it to Florida, became the sole stockholder of Florida, and properly expected that any order which had the effect of depriving it of dividends on its stock would be subject to judicial review upon petition by it. American, by the order in question, as the sole stockholder, is now deprived of any distribution by way of dividends of the surplus of Florida to the extent of approximately $12,000,000.

The order states specifically that compliance with the order so restricting surplus and requiring the appropria-

tion from surplus of $700,000 per year was to be *without prejudice to respondents' right to contest these two paragraphs of the order.* (See paragraphs 3 and 4 of the Order, Appendix A). The order, as so written refers to review on behalf of both respondents, namely, American and Florida. The purpose was to permit consummation of the reorganization program without precluding review of the paragraphs specified.

After American filed its petition in the Circuit Court of Appeals for the First Circuit, Florida filed its Petition for Review of these orders by the United States Circuit Court of Appeals for the Fifth Circuit.

On June 19, 1944, the Circuit Court of Appeals for the First Circuit issued its opinion directing that Petitioner's Petition for Review be dismissed upon the ground that the Petitioner, in effect, was not a "person or party aggrieved" within the meaning of Section 24(a) of the Act.

The Question Presented.

Is Petitioner a person or party aggrieved by paragraphs numbered 2 and 4 of the order of the Commission dated December 28, 1943, within the meaning of Section 24(a) of the Act and so entitled to independent judicial review thereof?

Specification of Error to be Urged.

The Circuit Court of Appeals for the First Circuit erred in holding that the Petitioner was not a person or party aggrieved within the meaning of Section 24(a) of the Act and that, therefore, it was not entitled to a judicial review of paragraphs numbered 2 and 4 of the said order of the Commission.

Reasons Relied on for Grant of Writ.

(1) Whether a stockholder affected directly and adversely by an order of the Commission, under the Act here involved, which grants the right to seek review to "any person or party aggrieved", or by orders entered by Commissions under other statutes containing similar language with regard to review, is entitled to review of the order which is directed in the first instance against the stockholder's corporation, is an important Federal question which has not been, but should be, settled by this Court.

(2) The Court below in dismissing American's petition for review on the ground that it was not a "person or party aggrieved" within Section 24(a) of the Act, has decided a Federal question in a way probably in conflict with decisions of this Court under other statutes giving a right to seek review to persons "aggrieved", which decisions should have been held applicable in the present case.

The decision below is in conflict with principles recognized in decisions of other Circuit Courts of Appeals, a prior decision of the Court below and is in conflict with principles followed by this Court in numerous of its decisions.

(3) A real question of deprivation of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States is presented in the instant case, as the petitioner by the decision below has been denied judicial review of an administrative order which deprives it of its reasonable expectancy of many millions of dollars.

WHEREFORE, for the reasons stated above and discussed more fully in the annexed brief, your petitioner prays that a writ of certiorari be issued out of and under the seal of this honorable Court, directed to the United States Circuit Court of Appeals for the First Circuit, to the end that the above cause may be certified to and reviewed and determined by this Court and that the judgment of said Circuit Court of Appeals in the above-entitled cause may be reviewed by this Court, and your petitioner prays for such other and further relief as this Court may deem just and proper.

Respectfully submitted,

A. J. G. PRIEST,
R. A. HENDERSON,
JAMES S. REGAN,
Counsel for Petitioner.

September 15, 1944.

BRIEF IN SUPPORT OF PETITION.

[For index, table of cases, table of statutes, reference to opinion below, jurisdictional statement, summary statement of the case and specification of error, we refer to the petition.]

While the provisions of the order sought to be reviewed are in the first instance directed to Florida, the injury resulting from carrying out those provisions is suffered by American. The order directs Florida to charge off large amounts of its surplus and thereby make cash equivalent to those sums unavailable for payment as dividends to Florida's stockholder, American. Thus, Florida is ordered to retain large sums of money as against its sole stockholder, which would otherwise be entitled to receive the money as dividends. Yet in this situation the Court below has held (a) that Florida, which is ordered to keep the money in question, is the only one entitled to appeal from these provisions of the order and (b) that American, the stockholder which is being deprived of dividends in the amount which Florida is ordered to retain, has no standing to appeal from the order. The effect of the decision dismissing American's petition for review is to deny a review to the very party which is injured by these provisions of the order.

The inequity of the decision below denying American the right to seek review of the order is emphasized by the fact that American was made a party to the proceeding by the Commission at the very inception of the proceeding, that it actively participated therein throughout, and that the provisions of the order which are sought to be reviewed specifically recite that dispositions made therein are without prejudice to respondents' right to contest the order.

After having thus been made a party by the Commission to the proceeding and having been heard by the Commission which thereupon overruled its contentions, American now has been held not to be "aggrieved" by the order and to have no sufficient interest to review the order.

In arriving at its decision, the Court below held that the rule applicable to ordinary lawsuits against a corporation, namely, that those lawsuits must be defended, and judgments therein against the corporation appealed from, by the corporation and not by its stockholders, was applicable to review of the order here in question. We submit that in so holding that Court fell into plain error. It gave no effect to the specific language which Congress inserted in Section 24(a) of the Act broadening the right to seek review by granting it to any "person or party aggrieved". Certainly there is no warrant for emasculating that broad language so that it is given no more effect than if the statute contained the restricted right of appeal given in ordinary lawsuits only to the person against whom a judgment is entered. No case was cited by the Court below in its opinion in which a stockholder was denied a right of review from an order against his corporation where the statutory review provision contained the broad language appearing in Section 24(a) of the Act.

Moreover, the Court below failed to give effect to the difference between a situation where a money judgment is entered against a corporation directing the corporation to pay money from its treasury to a third person, and a situation, like the present one, where a company is being directed to *retain* money as against its stockholder. In the first situation there is no possible conflict of interest between the corporation and its stockholder; therefore, the corporation by its appeal fully protects its own interests and the interests of its stockholders. But in the second

situation, which is the present situation, there is an obvious difference between the interests of the corporation and the interests of its stockholder. The corporation ordered to retain the money has no such vital interest in seeing that it is made available for payment to its stockholders as have the stockholders. Also, the corporation may be met on its appeal with the defense that it has suffered no injury since it has been ordered to retain money rather than pay it out.*

We submit that the Circuit Court of Appeals has interpreted Section 24(a) of the Act erroneously and such interpretation should be corrected by this Court to the end that doubt as to the meaning should be removed and the correct meaning be settled by this Court.

This Court has not determined who is "a person or party aggrieved by an order issued by the Commission" within Section 24(a) in any case, or determined whether stockholders whose dividends are restricted by orders of the Commission are to be denied the rights specifically given by Congress in the enactment of the statute "to any person or party aggrieved".

The case, therefore, presents one aspect of a question of great importance in the conduct and management of public utility operating and holding companies, namely, whether an order of the Commission directing or controlling the use of the net income of an operating company,

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* In fact, that very question was raised in this Court recently on the oral argument of *Northwestern Electric Co.* v. *Federal Power Commission*, 321 U. S. 119 (1944). As appears from the stenographic transcript of the argument, a Justice of this Court inquired how Northwestern Electric Co. (which is another subsidiary of American) could complain that a Federal Power Commission order deprived it of property when the effect of the order was to order Northwestern to retain certain amounts instead of paying them out in dividends to American. That point was met by informing the Court that American was a petitioner for review as well as Northwestern. But by the order below in the present case American is being deprived of the right similarly to protect its interests in the present case.

the effect of which order is direct and damaging to the stockholder, may not be reviewed by the stockholder in its own right. The damage sustained by American is peculiar to it, and is suffered by no other security holder or any other party. This question is of extreme importance to every public utility holding company for, if the interpretation of the Circuit Court of Appeals is correct, a stockholder in its own right, sustaining damage peculiar to it, is denied the review of an order which might prevent the payment of dividends on its stock for what must be an extended, and may be an indefinite, period of time.

In its opinion, the Circuit Court of Appeals stated that the phrase "'any person or party aggrieved' is not one of exact meaning" and from that premise concluded that if Congress had intended to confer upon a stockholder an independent right to seek a review of an administrative order directed against the corporation (which right the Court concludes is a departure from the ordinary principles of corporate law), Congress would have expressed such intention in explicit language. On its face this conclusion seems to do violence to the exact language used by Congress, viz: "any person or party aggrieved".

The Circuit Court of Appeals has applied a rule of law in construing Section 24(a) of the Public Utility Holding Company Act in a way which probably conflicts with applicable decisions of this Court.

Northwestern Electric Co. v. *Federal Power Commission*, 321 U. S. 119 (1944), has already been mentioned above. As in this case, so in *Northwestern*, an order had been directed by the Federal Power Commission against an operating utility, all of whose common stock is owned by American Power & Light Company, Petitioner here. American joined with Northwestern in an application for a review by this Court of that order. The application was

granted and argument later had thereon on behalf of both petitioners. The decision of this Court in that case commences with the words "petitioners" and the Court considered the position of American Power & Light Company as a stockholder.

The decision of the Circuit Court of Appeals likewise runs counter to the decision of this Court in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470 (1940). In the *Sanders* case, *supra*, this Court permitted a radio broadcasting licensee to review the action of the Commission in granting a permit for the erection of a rival station on the basis that an economic injury was suffered by the licensee to the extent that he became "a person aggrieved or whose interests are adversely affected" by the decision of the Commission within the meaning of Section 402(b)(2) of the Communications Act of 1934, 48 Stat. 1064, 1093. Thus this Court effectuated the purposes of the particular statute.

Another decision of this Court with which the decision below conflicts is *Federal Communications Commission* v. *National Broadcasting Co.*, 319 U. S. 239, where this Court said at page 248:

> "It would be anomalous if one entitled to be heard before the Commission should be denied the right of appeal from an order made without hearing."

The Act before this Court was the Federal Communications Act, Section 402(b)(2), which permits an appeal by any "person aggrieved or whose interests are adversely affected." In the present case, American was made a party by the Commission to the proceeding, was heard throughout and *a fortiori* is entitled to seek review of the order entered after the hearing.

Another decision of this Court with which the decisions below conflicts is *Interstate Commerce Commission* v.

Washington-Oregon Railroad & Navigation Co., 288 U. S. 14 (1933). In that case it was held that persons who had been permitted to intervene in the proceedings below were entitled to appeal under the provision there involved giving "aggrieved parties" the right to appeal notwithstanding that the original party (the United States) refused to appeal. While three Justices dissented in that case, the decision was unanimous on the right to appeal since the majority decided against the appellants on the merits and the minority were of the view that there should have been a decision on the merits in favor of the appellants.

In disregard of Section 24(a) of the Act and in disregard of the difference in position of Florida and American, the Court below based its decision on the fact that Florida could and did file a Petition for Review of the identical order of the Commission. It is totally irrelevant that Florida, the operating company, could or did file a petition to review the order of the Commission. The impact of the order for every practical purpose is directly upon American. Whether Florida did or did not pay dividends might be unimportant to Florida but failure of American to receive presently its just return on its substantial investment by way of dividends available from current earnings for that purpose, because the earnings are diverted to another purpose by force of the Commission's order, does irreparable damage to American. Not only is American a person or party aggrieved; it was considered by the Commission to be a necessary party to these proceedings before the Commission. The possibility that, insofar as the paragraphs of the Commission's order sought to be reviewed are concerned, the proceeding could have been instituted by the Commission against Florida alone, does not alter or destroy American's standing as a party aggrieved so that American must proceed only through Florida in order to obtain the review of the Commission's order.

In addition to the cases above mentioned the Circuit Court of Appeals likewise differs from the decisions reached by Circuit Courts of Appeals of other Circuits, namely, i.e. *Associated Industries Inc.* v. *Ickes,* 134 F. 2d 694 (C. C. A., 2nd); *Todd* v. *Securities and Exchange Commission,* 137 F. 2d 475 (C. C. A., 6th) and *Okin* v. *Securities and Exchange Commission,* 137 F. 2nd 398 (C. C. A., 2nd).

The confusion surrounding the question is further intensified by two decisions of the Circuit Court of Appeals for the Second Circuit, handed down subsequent to the decision of the Court below, in cases entitled *Okin* v. *Securities and Exchange Commission* (July 10, 1944), not yet reported. In both cases the petitioner was the owner of 9,000 shares out of a total of 5,250,000 shares of common stock of Electric Bond and Share Company. In the first case, the petitioner sought review of the entire order, parts of which are here involved, and which was directed to Florida Power & Light Company and American. Electric Bond and Share Company is a minority stockholder of American owning about 31% of its common stock. In the first case, the petitioner, who was not a party to the administrative proceedings, was said not to suffer any damage peculiar to himself or different in kind from damages sustained by all common stockholders of Electric Bond and Share Company and was, therefore, not a party aggrieved. The order of the Commission there in question was not directed either to the petitioning stockholder or to Electric Bond and Share Company. On the same day, July 10, 1944 in the second case, the Second Circuit Court of Appeals held that the same petitioning stockholder was entitled to judicial review of an order of the Commission authorizing a financial transaction between Electric Bond and Share Company and its subsidiary, American & Foreign Power Company.

Moreover, by its decision in this case the Circuit Court below in substance and fact reversed its prior determination in *Lawless* v. *Securities and Exchange Commission*, 105 F. 2d 579. In the opinion of the Court below, it is now said that, "in so far as the language of the Lawless opinion may intimate that the petitioner was a person aggrieved merely by virtue of the fact that he had been admitted to participation in the proceedings before the Commission we do not think that it is correct". We submit that an opinion of this Court, construing for the first time the provisions of Section 24(a) of the Act, is requisite to remove the confusion evidenced by these decisions.

The Circuit Court of Appeals in attempting to apply inapplicable rules of common law relating to the so called "derivative actions" of stockholders on behalf of corporations, demands of the Petitioner full submission to a test not contemplated by Congress when it enacted Section 24(a) of the Public Utility Holding Company Act.

The Circuit Court of Appeals, by dismissing the petition for review for alleged lack of jurisdiction, has deprived this petitioner of its right to judicial review provided for by Section 24(a) of the Act and guaranteed by the due process clause of Article Fifth of the Amendments to the Constitution of the United States.

The denial of judicial review for lack of jurisdiction is a denial of due process of law in violation of the Fifth Amendment to the Federal Constitution. American, a party to these proceedings before the Commission, is having its property taken without just compensation and is being deprived of its property without due process of law. American is the owner of all the outstanding common stock of Florida and is entitled by way of dividends on said common stock to so much of the net income of Florida as its directors may think feasible to distribute consistently with its

cash resources and cash requirements. Under the order of the Commission, however, American must forego dividends on Florida's common stock in an amount equivalent to the charges of more than $12,000,000 which Florida must make against surplus. Of this amount, $1,800,000 must be charged in 1944 and there must be an appropriation of $700,000 annually to a contingency reserve until a total of approximately $10,500,000 is accumulated. The gravity of the effect of this order on American's investment in Florida is patent. American has made voluntary contributions amounting to millions of dollars to Florida and is entitled to protection of the remainder of its investment in Florida from the adverse effect of the order of this Commission.

That such a taking of property as the Commission's order contemplates is condemned by the Fifth Amendment, has been made abundantly clear by decisions of this Court. Although Congress, as an incident of the exercise of its commerce powers, may impair contract rights to the extent they are executory, it may not confiscate property founded on contract rights vested at the time of the passage of an act purporting to grant such power, either for the benefit of the public or for one individual or group at the expense of another. For example, in *Lynch* v. *United States*, 292 U. S. 571, Mr. Justice Brandeis, speaking for the Court, said, at page 579:

> "*Second.* The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. *United States* v. *Central Pacific R. Co.*, 118 U. S. 235, 238; *United States* v. *Northern Pacific Ry. Co.*, 256 U. S. 51, 64, 67."

Again, in the case of *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, construing the so-called Frazier-Lemke Act of June 28, 1934, it was held, also in an opinion by Mr. Justice Brandeis, that, although that Act was adopted pursuant to the broad bankruptcy powers granted to Congress under the Constitution, the power therein granted must be exercised subject to the restrictions of the Fifth Amendment and that Congress may not take for the benefit of the debtor or the public rights in specific property acquired by the creditor prior to the date of the Act.

In the *Northwestern* case, the opinion of the Circuit Court of Appeals, 134 Fed. 2d 740, does make this observation as to American's normal right to dividends on stock of the operating company (p. 744):

> "While it might be said that American is not entitled to the earnings until declared as dividends, and therefore nothing has been taken from it, that view disregards realities. *It is certainly possible, if not probable, that the market value of the stock would decrease, probably substantially, if no dividends can be paid thereon for ten years or more.*" (Citing Kansas City So. Ry. *v.* United States, 231 U. S. 423, 455.) (Italics supplied.)

Disavowal by the Commission, both in its brief and upon the argument before the Court below, that the motion to dismiss was a procedural step to render unavailable or weaken contentions which American, rather than Florida, should make is futile when viewed in the light of the effect of the order dismissing American's petition. Whether the Commission intends to foreclose the contention available to American is of no moment so long as the effect of the order may be that very thing. Failure of the Commission to raise any objection to Florida's making the contention that American is being improperly deprived of its prop-

erty without due process of law because of its being deprived of dividends from Florida's surplus is without significance, if the Appellate Court itself brings up the question, as was done in the oral argument in this Court in the *Northwestern Electric Company* case already referred to.

Nor is the possibility that numerous petitions to review might be filed by stockholders a valid ground for denying this petitioner its independent right of review. In *Associated Industries* v. *Ickes*, 134 F. 2d 694, it was contended that to allow consumers to appeal would open up the "possibilities of separate law suits by hundreds of thousands of individual consumers." In that case it was pointed out that there are only eleven circuits where such petitions could be so filed and the filing of the transcript in any one of the eleven Circuit Courts gives that Court exclusive jurisdiction of any and all appeals from the particular order, so that upon application duly made, all other appeals would be transferred to and consolidated in the Court having jurisdiction and there would be only one consolidated appeal in one Court.

By its decision, the Court below holds that to permit "a person or party aggrieved" to obtain a review of an order of the Commission such "person or party aggrieved" must meet the qualifications prescribed for one's "standing to sue" in the Federal Courts.* In reasoning

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* This is directly contrary to the decisions of this Court, which, as stated in *Associated Industries* v. *Ickes*, 134 Fed. (2d) 694 at 702 (C. C. A. 2, 1943), hold that under a statutory provision giving a "person aggrieved" the right to seek review, that person, in order to obtain review, need not have the "standing" required to bring an ordinary lawsuit. The *Associated Industries* case contains an exhaustive discussion of the right of review granted by such a statutory provision and points out how much broader the right of appeal is in such cases than it is in ordinary lawsuits.

to this conclusion the Court below relies almost solely on the decision of this Court in *Pittsburgh & West Virginia Ry Co.* v. *United States*, 281 U. S. 479 (1930). But that decision does not support the principle. The *Pittsburgh & West Virginia* case, *supra*, was a law suit, not an administrative proceeding. This is obvious from a reading of the opinion. Speaking for the Court, Judge Brandeis (p. 487) stated:

> "* * * Unlike orders entered in cases of reorganization, and in some cases of acquisition of control of one carrier by another, the order under attack does not deal with the interests of investors. The injury feared is the indirect harm which may result to every stockholder from harm to the corporation. Such stockholder's interest is clearly insufficient to give the Pittsburgh a standing independently to institute suit to annul this order."

The order sought to be reviewed by the petitioner herein is akin to an order of reorganization and most affirmatively does "deal with the interest of investors". But more important, the order sought to be reviewed in *Pittsburgh & West Virginia Ry. Co., supra*, was under the Urgent Deficiencies Act which did not allow, as does Section 24(a) of the Public Utility Holding Company Act, "any person or party aggrieved" to seek a review of the administrative order. In the *Pittsburgh* case the standing of the parties seeking review had to be decided upon general principles. Congress, in enacting the Public Utility Holding Company Act, sought to promote the public interest and the interest of investors or consumers and, to make certain that those affected by the provisions of the Act might be heard and have their day in Court, specifically provided that "any person or party aggrieved" by an order issued by the Com-

mission might, as an independent right, have the same reviewed by an appropriate court.

Congress in the Act here involved has employed specific language which gives to "any person or party aggrieved" an independent right of review no matter what its status, whether a corporation, stockholder, creditor, consumer or otherwise. The right to review given to the stockholder, American, by Section 24(a) of the Public Utility Holding Company Act, is an independent right and attaches to the stockholder by reason of the Act and is not derivative through its corporation.

That American is a "person aggrieved" is emphatically obvious. Does American gain or lose as a result of the impact of the order sought to be reviewed? The answer is that it stands to sustain substantial loss. Its right to be heard, particularly given by Congress, is withdrawn by judicial decree erroneously entered.

Conclusion.

It is respectfully submitted that the foregoing petition for writ of certiorari should be granted.

Respectfully submitted,

A. J. G. Priest,
R. A. Henderson,
James S. Regan,
Counsel for Petitioner.

September 15, 1944.

APPENDIX A.

UNITED STATES OF AMERICA

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

At a regular session of the Securities and Exchange Commission, held at its office in the City of Philadelphia, Pennsylvania, on the 28th day of December, A. D., 1943.

IN THE MATTER

of

FLORIDA POWER & LIGHT COMPANY
AMERICAN POWER & LIGHT COMPANY
ELECTRIC POWER & LIGHT COMPANY
File No. 59-26
FLORIDA POWER & LIGHT COMPANY
AMERICAN POWER & LIGHT COMPANY
File No. 70-403
(Public Utility Holding Company Act of 1935)

Order.

The Commission having instituted proceedings under Sections 11 (b) (2), 12 (b), 12 (c), 12 (f) and 15 (f) of the Public Utility Holding Company Act of 1935 directed to Florida Power & Light Company, an electric and gas utility, its corporate parent, American Power & Light Company, a registered holding company, and Electric Bond and Share Company, also a registered holding company, raising issues therein as to: the existence of substantial write-ups in the plant account; the adequacy of the reserve for retire-

ments and depreciation; the necessity for stopping dividends on preferred and common stocks held by American, and interest on the debentures owned by American; the existence of an unfair and inequitable distribution of voting power among its various classes of security holders, the steps necessary to cure such inequities, if found to exist, including subordination to publicly-held securities of American Power & Light Company's holdings of Florida Power & Light Company's preferred stock and debentures; and the treatment to be afforded certain sums received by American Power & Light Company from Florida Power & Light Company on or about July 1, 1941 as dividends on preferred stock; and

Florida Power & Light Company and American Power & Light Company having filed joint applications and declarations with amendments thereto under Sections 6, 7, 9, 10 and 12 of said Act relating to: the issuance and sale by Florida Power & Light Company to the public of $45,000,000 principal amount of first mortgage bonds and $10,000,000 principal amount of sinking fund debentures pursuant to the competitive bidding requirements of Rule U-50 under the said Act; the issuance and sale of $5,000,000 principal amount of serial notes to certain banks and institutions; the issuance of $5,000,000 principal amount of sinking fund debentures to American Power & Light Company in exchange for $5,000,000 debentures presently held by that company; the surrender by American Power & Light Company to Florida Power & Light Company, as a capital contribution to the latter company, of $17,000,000 principal amount of the debentures, 13,477 shares of the $7 preferred stock, 10,000 shares of the $6 preferred stock, and 20,000 shares of the second preferred stock of the latter company; and the transfer by American Power & Light Company, as a capital contribution to Florida Power & Light Company, of the notes, open account indebtedness, and capital stock of Utilities Land Company (a wholly-owned subsidiary of American Power & Light Company); and these proceedings by Order having been consolidated with the aforesaid proceedings instituted by the Commission; and

Samuel Okin having filed a request for leave to intervene in the above consolidated proceedings and haveing requested oral argument and permission to file a brief therein, and having been granted limited participation by the trial examiner; and

Public hearings having been held after appropriate notice and the Commission having considered the record and having made and filed its Findings and Opinion herein;

(1) IT IS HEREBY ORDERED pursuant to Sections 15(f) and 20(a) of the Public Utility Holding Company Act of 1935 that Florida Power & Light Company shall make upon its books of account the following adjustments:

(a) Florida shall, by appropriation from earned surplus (including earned surplus made available by transfer from insurance reserve), increase its reserve for property retirements in the amount of $2,400,000 as proposed by Florida:

(b) Florida shall, by charge to earned surplus, eliminate from its plant account the known system write-up therein in the amount of $27,615,043.91;

(c) Florida shall, by charge to earned surplus, eliminate from its plant account interest on excess capacity capitalized therein in the amount of $1,888,067.20;

(d) Florida shall, by charge to earned surplus, eliminate from its plant account capital stock expense capitalized therein in the amount of $114,728.00;

(2) IT IS FURTHER ORDERED that Florida Power & Light Company shall classify in Account 107 and eliminate from the plant account by charge to earned surplus not later than December 31, 1944, an amount of $1,815,655 consisting of capitalized intra-system profits paid to affiliated companies as construction and engineering fees;

(3) IT IS FURTHER ORDERED that Florida Power & Light Company, as a provision for the disposition of the capital-

ized intra-system profits ordered in paragraph (2) above to be classified in Account 107 and eliminated from the plant account by charging to earned surplus, shall each month during the calendar year 1944 retain out of, and shall restrict, earned surplus in an amount of not less than one-twelfth (1/12) of $1,815,655 until such time as a total of $1,815,655 shall have been retained and restricted and shall indicate by appropriate footnotes to all published financial statements that its earned surplus is subject to that restriction; compliance with such order so restricting surplus to be without prejudice to respondents' right to contest the classification of said $1,815,655 in Account 107 and the elimination of such item;

(4) IT IS FURTHER ORDERED that pending final determination of the amount and disposition to be made of Account 100.5 items presently in the plant account of Florida, Florida shall annually beginning with the calendar year 1944 appropriate out of earned surplus to a contingency reserve at least $700,000, such act of appropriation to be without prejudice, however, to respondents' right to contest the validity of any definitive order with respect to such items as may ultimately be issued;

(5) IT IS FURTHER ORDERED that the provisions of paragraphs (2), (3) and (4) above shall be deemed severable from the remaining portions of this order and shall not be deemed conditions to the granting of the applications and the effectiveness of the declarations with respect to the transactions proposed by applicants-declarants which are approved in paragraph (6) hereof;

(6) IT IS FURTHER ORDERED that said applications, as amended, be, and hereby are, granted, and said declarations, as amended, subject to Commission approval by further order of the terms of the bond and debenture financing which shall be determined by competitive bidding, and subject to Commission approval by further order of the terms of the serial note issue to be supplied by amend-

ment, be and hereby are, permitted to become effective forthwith, all subject to the terms and conditions contained in Rule U-24, and subject to the further condition that prior to or concurrently with the final closing with respect to the sale of the proposed bonds and debentures American Power & Light Company shall have made the proposed capital contributions to Florida Power & Light Company and Florida Power & Light Company shall have made upon its books of account the accounting adjustments proposed by it and hereinbefore ordered by us to be made in paragraph (1), sub-paragraphs (a), (b), (c) and (d) above.

(7) IT IS FURTHER ORDERED that jurisdiction be, and hereby is, reserved over all fees, commissions, or other remunerations to be paid in connection with the said joint applications and declarations;

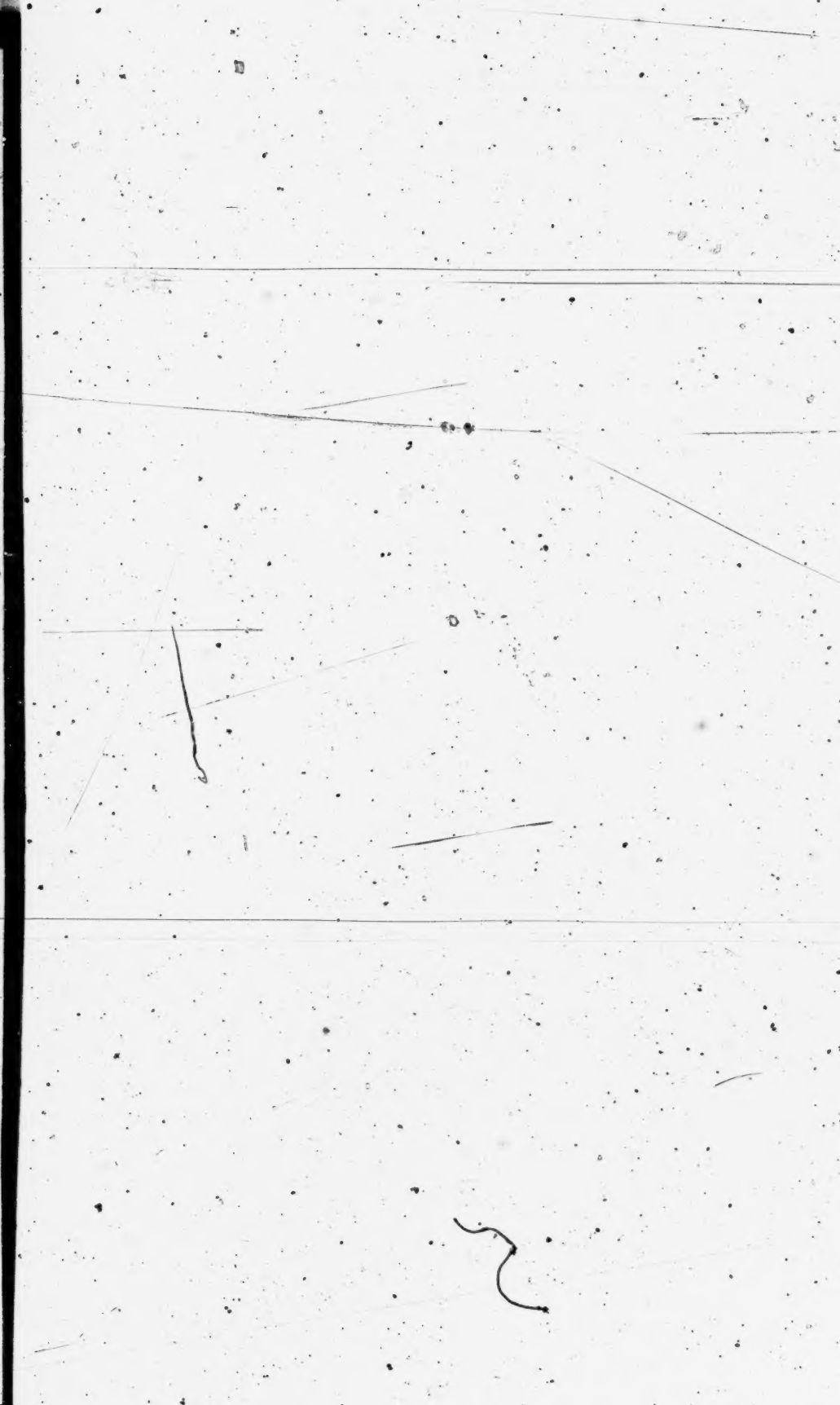
(8) IT IS FURTHER ORDERED that the restriction contained in our Order of July 10, 1941, which required American Power & Light Company to retain in a special account the dividends received on or about July 1, 1941 on its holdings of Florida's $7 and $6 preferred stock, is hereby terminated; and

(9) IT IS FURTHER ORDERED that the requests of Samuel Okin for leave to intervene, for oral argument, and for permission to file a brief be, and hereby are, denied.

By the Commission.

ORVAL L. DUBOIS,
Secretary.

(SEAL)



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 470

AMERICAN POWER & LIGHT COMPANY,
Petitioner,

against

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF PETITIONER

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BRIEF OF PETITIONER

The Opinion Below

The opinion of the Circuit Court of Appeals for the First Circuit was rendered on June 19, 1944, and is reported at 143 F. (2d) 250.

Jurisdiction

The jurisdiction of this Court is invoked under Section 24(a) of the Public Utility Holding Company Act of 1935

(49 Stat. 803, 834-5; 15 U. S. C. § 79x(a)) and Section 240(a) of the Judicial Code, as amended (28 U. S. C. § 347(a)).

The Petition for Writ of Certiorari was filed September 16, 1944, and was granted November 13, 1944.

The Writ brings before this Court the order of the United States Court of Appeals for the First Circuit dismissing the Petitioner's Petition for Review of an order of the Securities and Exchange Commission (hereinafter called the "Commission"). The Court below dismissed the Petition for Review on the ground that the Petitioner, American Power & Light Company (hereinafter sometimes called "American") had no right to judicial review of the Commission's order, notwithstanding that the purpose and effect of the order was to prevent Florida Power & Light Company from paying dividends to the Petitioner on its stock, all of which is owned by American. The one question before this Court at this time is the Petitioner's standing to maintain the Petition for Review.

Statute Involved

The statute involved is the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. § 79), hereinafter referred to as the "Act." The portion of that Act which is directly involved is Section 24(a) thereof (15 U. S. C. § 79x(a)), which reads in part as follows:

> "Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part * * *."

Statement of the Case

Description of the Petitioner

The Petitioner, American, is a corporation organized under the laws of the State of Maine, which registered as a holding company under the Act in 1938.

The Petitioner owns practically all the common stocks and some other securities of 14 corporations which are operating electric (and, in a few instances, gas) public utilities. The Petitioner is the only stockholder and owns all the issued and outstanding capital stock of Florida Power & Light Company (hereinafter referred to as "Florida").

Florida is an operating electric and gas utility conducting its business solely in the State of Florida. Florida's outstanding securities (after full compliance with the order of the Securities and Exchange Commission, other than the two paragraphs therein which are involved in this case and which are declared by the order to be separable from the remainder thereof) consist of $65,000,000 of debt and the common stock owned by the Petitioner. It has assets of approximately $100,000,000.

The Proceedings Before the Commission

The Securities and Exchange Commission (hereinafter called the "Commission") by its initial order of July 10, 1941, commenced proceedings, to which it made Petitioner a party, together with its subsidiary, Florida, and Electric Bond and Share Company. This initial order of the Commission raised issues which included "the necessity for stopping dividends on preferred and common stocks held by American * * *."

On August 8, 1941, after the Commission instituted the proceedings against American and the other two com-

panies, American and the other two companies proposed to the Commission a financial reorganization program for Florida, which involved substantial voluntary capital contributions by American to Florida and a refinancing of the bonds and the retirement of the preferred stock of Florida. American and Florida filed formal applications in connection with that program.

The Commission consolidated the proceedings instituted by it with the proceedings based on the reorganization program proposed by American and Florida. The Commission made both American and Florida parties to the consolidated proceedings.

Throughout the proceedings, American participated actively through witnesses and counsel, and presented evidence in its own behalf. At the hearings in those proceedings and in briefs, American offered contentions with respect to the particular matters discussed in this brief. Those contentions the Commission rejected.

The Commission's Order and the Petitions for Review Thereof

The consolidated proceedings culminated in the order of December 28, 1943, which so far as germane to the issue here, directed Florida (paragraph 2), first to take out of its surplus the sum of $1,815,655. It directed Florida to do this (paragraph 3) by retaining out of earned surplus 1/12 of that sum in each month of 1944. Secondly, it directed Florida to appropriate annually out of surplus (paragraph 4) the sum of $700,000, until approximately $10,000,000 had been so appropriated.

American, as a result of the reorganization which involved substantial contributions by it to the capital of Florida, became the sole stockholder of Florida, and properly expected that any order which had the effect of depriving it of dividends on its stock would be subject to judicial

review upon petition by it. American, as the sole stockholder, is now deprived by the order in question of any dividends by way of distribution of the surplus of Florida to the extent of approximately $12,000,000.

The order states specifically (paragraphs 3 and 4) that compliance with the order so restricting surplus and requiring the appropriation from surplus of $700,000 per year was to be without prejudice to *respondents'* right to contest paragraphs two and four. The order, as so written, refers to the right to contest the Commission's action on behalf of *both respondents,* namely, American and Florida. The purpose was to permit consummation of the reorganization program without precluding review of the paragraphs specified.

American filed its Petition for Review in the Circuit Court of Appeals for the First Circuit on February 3, 1944. Thereafter, Florida on February 25, 1944, filed its Petition for Review of these orders by the United States Circuit Court of Appeals for the Fifth Circuit.

On February 24, 1944, the Commission moved to dismiss the petition of American filed in the First Circuit.

On June 19, 1944, the Circuit Court of Appeals for the First Circuit issued its opinion and order directing that American's Petition for Review be dismissed upon the ground that the Petitioner was not a "person or party aggrieved" within the meaning of Section 24(a) of the Act.

For convenience, paragraphs 2 and 4 of the order of the Commission dated December 28, 1943 (R. 8-12), of which Petitioner seeks judicial review, and paragraph 3 thereof, which connects those paragraphs, are here set forth as follows:

> "(2) IT IS FURTHER ORDERED that Florida Power & Light Company shall classify in Account 107 and eliminate from the plant account by charge to earned

surplus not later than December 31, 1944, an amount of $1,815,655 consisting of capitalized intra-system profits paid to affiliated companies as construction and engineering fees;

"(3) IT IS FURTHER ORDERED that Florida Power & Light Company, as a provisions for the disposition of the capitalized intra-system profits ordered in paragraph (2) above to be classified in Account 107 and eliminated from the plant account by charging to earned surplus, shall each month during the calendar year 1944 retain out of, and shall restrict, earned surplus in an amount of not less than one-twelfth (1/12) of $1,815,655 until such time as a total of $1,815,655 shall have been retained and restricted and shall indicate by appropriate footnotes to all published financial statements that its earned surplus is subject to that restriction; compliance with such order so restricting surplus to be without prejudice to respondents' right to contest the classification of said $1,815,655 in Account 107 and the elimination of such item;

"(4) IT IS FURTHER ORDERED that pending final determination of the amount and disposition to be made of Account 100.5 items presently in the plant account of Florida, Florida shall annually beginning with the calendar year 1944 appropriate out of earned surplus to a contingency reserve at least $700,000, such act of appropriation to be without prejudice, however, to respondents' right to contest the validity of any definitive order with respect to such items as may ultimately be issued;"

The Question Presented

Is Petitioner a person or party aggrieved by paragraphs numbered 2 and 4 of the order of the Commission dated December 28, 1943, within the meaning of Section 24(a) of the Act, and so entitled to independent judicial review thereof?

Specification of Error to Be Urged

The Circuit Court of Appeals for the First Circuit erred in holding that the Petitioner was not a person or party aggrieved within the meaning of Section 24(a) of the Act and that, therefore, it was not entitled to a judicial review of paragraphs numbered 2 and 4 of the said order of the Commission.

Summary of Argument

American is a person or party aggrieved within the meaning of Section 24(a) of the Act.

Respondent admits that American has a substantial interest which is affected by the order.

The Court below erroneously substituted for the words and intent of the Act the rule of judicial decisions governing actions by minority stockholders on behalf of their corporations.

The said rule of judicial decisions with respect to independent minority stockholders' actions is inapplicable because

1) The statute clearly gives the right of judicial review to any aggrieved party;

2) Here the petitioner as sole stockholder suffers deprivation of dividends and loss in value of its stock, both injuries being peculiar to it; and

3) The petitioner, as the possessor of an interest which made it a necessary party to the administrative proceedings, is a party directly aggrieved.

The opinion below deprives petitioner of its right of judicial review in violation of the due process provisions of the Fifth Amendment of the Federal Constitution.

Argument

American is a "person or party aggrieved" by the order of the Commission, within the meaning of Section 24(a) of the Act.

The Court below, in holding to the contrary, refused to carry out the intention of Congress as expressed in unequivocal language in the statute.

American was a party to the proceedings before the Commission from their very inception, having been named by the Commission as a respondent, so that there is no question here as to whether a "person or party" includes a person who was not a party to the proceeding before the Commission. Therefore, the only issue before this Court is whether American is "aggrieved" by the provisions of the order sought to be reviewed.

Since it is unquestionable that the Commission's order has a substantial adverse economic effect on American (and the Commission has so conceded as will hereafter appear), it does not seem to us debatable that American is "aggrieved" by the provisions of the Commission's order which were entered over its vigorous protests. This would be true even if American suffered no injury from the Commission's order other than through the effect of the order on Florida, of which American is the sole stockholder. But American here has also suffered a direct and primary injury since the purpose and effect of the portion of the Commission's order sought to be reviewed was to restrict payment of dividends by Florida to American by making approximately $12,000,000 unavailable for that purpose. Therefore, while the provisions of the order sought to be reviewed are in the first instance directed to Florida, the injury resulting from carrying out those provisions is suffered by American.

The provisions of the order which are sought to be reviewed direct Florida to charge off large amounts of its earned surplus and thereby make cash, equivalent to those sums, unavailable for payment as dividends. Thus, Florida is ordered to retain large sums of money as against American, its sole stockholder, which would otherwise be the only person or party entitled to receive the money as dividends. Yet in this situation the Court below has held (a) that Florida, which is ordered to keep the money in question, is the only one entitled to appeal from these provisions of the order, and (b) that American, the stockholder which is being deprived of dividends in the amount which Florida is ordered to retain, has no standing to appeal from the order. The effect of the decision dismissing American's Petition for Review is to deny a review to the party which is injured by these provisions of the order.

The inequity of the decision below denying American the right to seek review of the order is emphasized by the fact that American was made a party to the proceeding by the Commission at the very inception of the proceeding, that it actively participated therein throughout, and that the provisions of the order which are sought to be reviewed specifically recite that dispositions made therein are without prejudice to *respondents'* right to contest the order. After having thus been made a party by the Commission to the proceeding and having been heard by the Commission which thereupon overruled its contentions, and having had its right to judicial review appropriately preserved, American now has been held not to be "aggrieved" by the order and to have no interest sufficient to entitle it to judicial review of the order.

In arriving at its decision, the Court below held that the rule applicable to ordinary lawsuits against a corporation, namely, that those lawsuits must be defended, and judgments therein against the corporation appealed from,

by the corporation and not by its stockholders, was applicable to review of the order here in questoin. We submit that in so holding that Court fell into plain error. It gave no effect to the specific language which Congress inserted in Section 24(a) of the Act broadening the right to seek review by granting it to any "person or party aggrieved."

Moreover, the Court below failed to give effect to the difference between a situation where a money judgment is entered against a corporation directing the corporation to pay money from its treasury to a third person, and a situation, like the present one, where a company is ordered to *retain* money as against its stockholder. In the first situation there is no possible conflict of interest between the corporation and its stockholder; therefore, the corporation by its appeal fully protects its own interests and the interests of its stockholders. But in the second situation, which is the present situation, there is an obvious difference between the interests of the corporation and the interests of its stockholder. The corporation ordered to retain the money has no such vital interest in seeing that it is made available for payment to its stockholders as have the stockholders. Also, the corporation may be met on its appeal with the defense that it has suffered no injury since it has been ordered to retain money rather than pay it out.[1]

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[1] In fact, that very question was raised in this Court recently on the oral argument of *Northwestern Electric Co.* v. *Federal Power Commission*, 321 U. S. 119 (1944). As appears from the stenographic transcript of the argument, a Justice of this Court inquired how Northwestern Electric Co. (which is another subsidiary of American) could complain that a Federal Power Commission order deprived it of property when the effect of the order was to order Northwestern to retain certain amounts instead of paying them out in dividends to American. That point was met by informing the Court that American was a petitioner for review as well as Northwestern. But by the order below in the present case American is being deprived of the right similarly to protect its interests in the present case.

The respondent, on page 12 of its Brief in opposition to the petition to this Court for a writ of certiorari said:

> "We do not, of course, question the fact that petitioner as the sole stockholder of Florida has an economic interest as substantial as that of Florida. Nor do we question the fact that the term 'person aggrieved' is broad enough to include the economic interest of a stockholder as a 'person aggrieved' by an order affecting his company wherever the circumstances are such as to make it inequitable that the stockholder be bound by the action or inaction of the management."

We submit that that concession alone is enough to require reversal by this Court of the order of the Court below dismissing American's Petition for Review.

The Court below, "legislated" by imposing on Section 24(a) an exception which Congress did not place there, namely, the exception that where a corporation files a petition for review as an "aggrieved" person or party, a stockholder may not file such a petition for review even if he is also an "aggrieved" person or party.

The decision below erroneously substituted, for the words and intent of the Act, the rule of judicial decisions governing the standing of minority stockholders to maintain independent actions on behalf of their corporations. That rule is inapplicable because (1) the statute clearly gives to any aggrieved party the right to judicial review of the administrative exercise of the comprehensive regulatory powers conferred upon the Commission, (2) in this case American as the sole stockholder suffers the deprivation of dividends and loss in value of its stock, both of which are peculiar to it, and (3) American, as the possessor of an interest which made it an actual, necessary and proper party to the administrative proceedings, is a party most directly aggrieved.

(1) The error of the Court below, in reasoning to a complete disregard of the language of the statute, is highlighted by reliance on inapplicable judicial authority. For instance, the Court, after adverting four times to *Pittsburgh and West Virginia Ry. Co.* v. *United States*, 281 U. S. 479 (1930), and after quoting from that opinion (R. 22), said:

> "It is true that the Urgent Deficiencies Act, under which review of the order of the Interstate Commerce Commission was sought in Pittsburgh & West Virginia Ry. Co. v. United States, *does not provide, as does § 24(a)* of the Public Utility Holding Company Act, that 'any person or party aggrieved' may seek a review of the administrative order, but leaves the moving party's standing to seek review to be determined upon general principles." (Italics supplied.)

Contra the opinion below (R. 23), if the Congress had intended to leave the moving party's standing to be determined on general principles, it obviously would have followed the pattern of the Urgent Deficiencies Act (38 Stat. 219). But it did not.[2] This Court in *Federal Power Commission* v. *Pacific Power & Light Company*, 307 U. S. 156, 159 (1939), noted that with respect to the review provisions of the Federal Power Act (49 Stat. 860) the Congress had departed from the provisions of the Urgent Deficiencies Act and said (p. 159):

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[2] The intention of the Congress to depart from the rules governing derivative and independent actions by minority stockholders is evidenced by the legislative history of the Act. The Act as originally introduced in both Houses of the 74th Congress, First Session, Senate Bill 1725, Section 24(a) and House Resolution 5423, Section 23(a), provided as to review: "Any person aggrieved by an order issued by the Commission in a proceeding under this title to which such person is a party may obtain a review of such order." Thus, in the bill as introduced, review was restricted to a party to the administrative proceeding. Congress was not content with this and as a result the section was changed, so that in the Bill as finally passed by both Houses, persons not parties who were aggrieved by an order were not left without redress but were entitled to judicial review.

> "* * * the Power Act contains a distinctive formulation of the conditions under which resort to the courts may be made and Congress determines the scope of jurisdiction of the lower federal courts."

Thus, the formula deliberately chosen by Congress must govern the whole matter of judicial review here, as in the above cited case, since the Congress in the Act now before the Court followed substantially the pattern of the Federal Power Act.

The Court below relied heavily on the case of *Pittsburgh and West Virginia Ry. Co.* v. *United States*, 281 U. S. 479 (1930), *supra*, notwithstanding the difference between the language of the Urgent Deficiencies Act and that of Section 24(a) and applied the ordinary "standing to sue" doctrine in the present case. The Court below instead should have followed the later decision of this Court in *Interstate Commerce Commission* v. *Oregon-Washington Railroad & Navigation Co.*, 288 U. S. 14 (1933), which involved a statute similar to Section 24(a) giving "aggrieved" parties the right to appeal. In that case, this Court held that persons who had been permitted to intervene in the proceedings below were entitled to appeal, notwithstanding that the original party (the United States) refused to appeal. The decision was unanimous on the right to appeal since the majority decided against the appellants on the merits and the dissenting three justices were of the view that the appellants should have a decision, on the merits, reversing the order appealed from. This Court thus held inapplicable, under a statute giving "aggrieved parties" the right to appeal, the "standing to sue" doctrine applicable to ordinary lawsuits and as applied to efforts to bring independent suits in *Pittsburgh and West Virginia Railway Co.* v. *United States*, *supra*, and in *Alexander Sprunt & Son, Inc.* v. *United States*, 281 U. S. 249 (1930).

The petition in *Northwestern Electric Company and American Power & Light Company* v. *Federal Power Commission*, 321 U. S. 119 (1944), was filed in the Circuit Court of Appeals and in this Court under the "person or party aggrieved" provisions of the Federal Power Act. As in this case, so in *Northwestern*, an order had been directed by the Federal Power Commission against an operating utility, all of whose common stock is owned by American Power & Light Company, Petitioner here. American joined with Northwestern in an application for a review by this Court of that order. The application was granted and argument later had thereon on behalf of both petitioners. The decision of this Court in that case commences with the words "petitioners" and the Court considered the position of American Power & Light Company as a sole stockholder.

In *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470 (1940), the "person aggrieved or whose interests are adversely affected" provision (Section 402(b)(2), 48 Stat. 1064, 1093) of the Federal Communications Act was involved. In the *Sanders* case, this Court gave to a radio broadcasting licensee judicial review of the action of the Commission in granting a permit for the erection of a rival station on the basis that an economic injury was suffered by the licensee. Thus this Court gave effect to the purposes of the particular statute.

In *Associated Industries* v. *Ickes*, 134 F. (2d) 694, 702 (1943), the Circuit Court of Appeals for the Second Circuit construed the decisions of this Court to hold that under a statutory provision giving a "person aggrieved" the right to seek review, that person, in order to obtain review, need not have the "standing" required to bring an ordinary lawsuit. The *Associated Industries* case contains an exhaustive discussion of the right of review granted by such a statutory provision and points out how much broader

the right of appeal is in such cases than it is in ordinary lawsuits.[3]

(2) In disregard of Section 24(a) of the Act and in disregard of the difference in position of Florida and American, the Court below based its decision on the fact that Florida could and did file a Petition for Review of the identical order of the Commission. It is totally irrelevant that Florida, the operating company, was able to, could be compelled to, or did file a petition to review the order of the Commission. The impact of the order for every practical and significant purpose is directly upon American. Whether Florida did or did not pay dividends might be unimportant to Florida but the diversion to another purpose, by force of the Commission's order, of dividends available from current earnings by way of just return on American's substantial investment, does direct and irreparable damage to American.

In the *Northwestern* case, already mentioned, the Circuit Court of Appeals, 134 F. 2d 740, made this observation as to American's normal right to dividends on stock of the operating company (p. 744):

> "While it might be said that American is not entitled to the earnings until declared as dividends, and therefore nothing has been taken from it, that view disregards *realities*. It is certainly possible, if not probable, that the market value of the stock would decrease, probably substantially, if no dividends can be paid thereon for ten years or more." (Citing Kansas City So. Ry. v. United States, 231 U. S. 423, 455.) (Italics supplied.)

[3] It was also held in *Associated Industries* v. *Ickes*, *supra*, that a person who was properly made a party to an administrative proceeding was necessarily entitled to review the order made in that proceeding under a statutory provision giving a right of review to a person "aggrieved" (134 F. (2d), at pp. 708-12). This appears also to have been the rule in the Circuit Court of Appeals for the First Circuit, *Lawless* v. *Securities and Exchange Commission*, 105 F. 2d 574 (1939), until June 19, 1944, the date of the opinion below (R. 26).

Disavowal by the Commission that the motion to dismiss was a procedural step to render unavailable or weaken contentions which American, rather than Florida, should make, is futile when viewed in the light of the effect of the order dismissing American's petition. Whether the Commission intends to foreclose the contention available to American is of no moment so long as the result of the order may have that very effect. Willingness of the Commission to forego any objection to the possibility that Florida may contend for American that American is being improperly deprived of its property without due process, is without significance, if the question of the lack of interest of Florida in American's position can be raised by the Court itself as was done in the oral argument in this Court in the *Northwestern Electric Company* case already mentioned.

(3) The Court below erred also in disregarding the significance of judicial authority and administrative custom with respect to American's presence and participation as a party to the proceedings before the Commission.

An administrative order under the Federal Communications Act was involved in *Federal Communications Commission* v. *National Broadcasting Co.*, 319 U. S. 239 (1943), where this Court said at page 248:

> "It would be anomalous if one entitled to be heard before the Commission should be denied the right of appeal from an order made without hearing."

It would be equally anomalous to deny judicial review to one brought to hearing by order of the Commission itself.

The decision of the Court below also conflicts with the following decisions hereinbefore referred to:

Interstate Commerce Commission v. *Oregon-Washington Railroad & Navigation Co.*, 288 U. S. 14 (1933);

Federal Power Commission v. *Pacific Power & Light Co.*, 307 U. S. 156 (1939);
Federal Communications Commission v. *Sanders Bros. Radio Station*, 309 U. S. 470 (1940);
Northwestern Electric Company and American Power & Light Company v. *Federal Power Commission*; 321 U. S. 119 (1944);
Associated Industries v. *Ickes*, 134 F. (2d) 694 (1943).

The custom of the Commission (which must have been based on administrative construction of the Act) in raising no objection to judicial review on behalf even of minority stockholders is illustrated in *Todd* v. *Securities and Exchange Commission*, 137 F. (2d) 475 (C. C. A. 6th, 1943) and *Lawless* v. *Securities and Exchange Commission*, 105 F. (2d) 574 (C. C. A. 1st, 1939). In those cases the Commission made no mention of the application of standards governing maintenance of actions by minority stockholders. The Commission now departs from its previous position, in a case involving the owner of all the stock, on the notion that venue may be duplicated if both American and Florida exercise their rights of review. There is nothing to that notion. Section 24(a) of the Act gives exclusive jurisdiction over all review proceedings to the Circuit Court in which the Commission files the transcript. *Associated Industries* v. *Ickes*, 134 F. (2d) 694 (C. C. A. 2d, 1943).

As to the suggestion (p. 11 of Respondent's Brief in Opposition to Petition for Certiorari) that to permit American to petition successfully for judicial review would be to permit it to pick the jurisdiction for litigation, it is settled that under the established procedure, the Commission could file the transcript with the Circuit Court of Appeals for the Fifth Circuit and, after such filing, the Circuit Court of Appeals for the First Circuit would transfer American's petition (if this Court reverses the order of

the Court below dismissing said petition and thus reinstates the petition) to the Fifth Circuit to be heard together with Florida's petition.

Columbia Oil & Gasoline Corporation v. *Securities and Exchange Commission*, 134 F. (2d) 265, 267, C. C. A. 3rd, January 25, 1943;

L. J. Marquis & Co. v. *Securities and Exchange Commission*, 134 F. (2d) 335, C. C. A. 2nd, February 4, 1943;

L. J. Marquis & Co. v. *Securities and Exchange Commission*, 134 F. (2d) 822, C. C. A. 3rd, March 23, 1943;

Koppers United Co. v. *Securities and Exchange Commission*, 138 F. (2d) 577, 578 (Ct. of App. D. C., October 11, 1943);

Hicks v. *National Labor Relations Board*, 100 F. (2d) 804, 805-6, C. C. A. 4th, January 9, 1939.

That American is a "person or party aggrieved" is obvious. Does American, a party whose contentions in the administrative proceedings were rejected, gain or lose as a result of the impact of the order sought to be reviewed? The answer is that it stands to sustain substantial loss. Its right to be heard, particularly and clearly given by Congress, is withdrawn by judicial decree erroneously entered. Thus, Petitioner is denied the benefits of constitutional due process.

CONCLUSION

It is respectfully submitted that the order of the Court below dismissing American's Petition for Review is erroneous and should be reversed.

Respectfully submitted,

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 470

AMERICAN POWER & LIGHT COMPANY, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Commission rendered December 28, 1943, the order of the same date (R. 8–12), and the order denying the petitioner's application for rehearing dated January 12, 1944, have not yet been officially reported but have been published as Holding Company Act Releases Nos. 4791, 4824 (containing corrections), and 4825 (denying rehearing).[1] The opinion of the Cir-

[1] We are filing for the information of the Court copies of the findings and opinion of the Commission as corrected. A supplemental order dated January 11, 1944, published as Holding Company Act Release No. 4828, was not challenged in the court below.

cuit Court of Appeals for the First Circuit is reported at 143 F. (2d) 250.

JURISDICTION

The decree of the Circuit Court of Appeals dismissing the petition for review was entered on June 19, 1944 (R. 26). The petition for a writ of certiorari was filed September 16, 1944. The jurisdiction of this Court is invoked by petitioner under Section 24 (a) of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 834–835, 15 U. S. C., sec. 79x (a)), and Section 240 (a) of the Judicial Code, as amended (28 U. S. C., sec. 347 (a)).

STATUTE INVOLVED

The statute involved is the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C., sec. 79, hereinafter referred to as "the Act"). The portions of respondent's order sought to be reviewed by petitioner were entered under Sections 15 (f) and 20 (a) of the Act. The text of these provisions is set forth in the Appendix, *infra*. Section 24 (a) of the Act provides in pertinent part:

> Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of

> Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. * * *

QUESTIONS PRESENTED

Whether a controlling stockholder of a company ordered by the Commission to effect changes in its accounts is a person "aggrieved" by such order within the meaning of Section 24 (a) of the Holding Company Act and is entitled as such to file an independent petition for review of such order.

STATEMENT

The petitioner, American Power & Light Company, incorporated in the State of Maine, is a subsidiary holding company in the Electric Bond and Share holding-company system and is itself a registered holding company. It is now the sole stockholder of Florida Power & Light Company, which is an electric and gas utility company in-

corporated in and operating exclusively in Florida.[2]

The order under review was entered in administrative proceedings in which there were consolidated, for purpose of hearing, issues raised by the Commission as to the necessity for Florida to effect changes in its accounts and security structure under applicable provisions of the Act, with proposals of Florida and American to meet those issues by what petitioner has characterized as a financial reorganization. These proposals, authorized by the Commission, include the elimination of "write-ups" in the accounts of Florida, capital contributions by American to Florida through surrender of certain debt securities and preferred stocks of Florida held by American, and the issuance and sale to the public of new bonds, debentures, and notes of Florida to "refund" the then outstanding publicly held bonds and preferred stocks of Florida. There remained a dispute as to the necessity of Florida's making certain additional accounting adjustments. The particular paragraphs of the Commission's order under review, requiring such additional accounting adjustments, were (by paragraph 5 of the order) expressly made severable from the remaining paragraphs of the order, and compliance therewith

[2] Petitioner and the above-mentioned associate companies are hereinafter referred to, respectively, as American, Bond and Share, and Florida.

was expressly stated not to be a condition to the granting of the applications of American and Florida to take the other action contemplated. The purpose of this severance was to facilitate anticipated judicial review.

On February 5, 1944, after consummation of the "reorganization," American filed its petition in the Circuit Court of Appeals for the First Circuit seeking to set aside paragraphs 2 and 4 of the order of December 28, 1943 (R. 1). On February 24, 1944, the Commission filed its motion to dismiss the petition, pointing out that "the Commission does not challenge the right of petitioner's subsidiary Florida Power & Light Company to seek review of this order, which is specifically directed to it", and that "we have given notice of our motion to petitioner in ample time for it to cause its subsidiary to file its petition for review in an appropriate circuit" (R. 14).[3] On February 25, 1944, Florida filed in the United States Circuit Court of Appeals for the Fifth Circuit its petition to review the same paragraphs of the Commission's order which had been challenged by American.

On June 19, 1944, the court below dismissed American's petition for review and it is this order which petitioner seeks to have reviewed by this Court.

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[3] The venue provisions of Section 24 (a) limit Florida to filing a petition for review either in the United States Court of Appeals for the District of Columbia or in the Circuit Court of Appeals for the Fifth Circuit.

ARGUMENT

The narrow issue involved is whether Congress in providing for review of Commission orders by any person "aggrieved" intended to authorize such review by a controlling stockholder of the corporation to which an order is directed and which is both immediately affected, and admittedly "aggrieved," by the order.

The decision of the court below that American was not aggrieved is correct, and, while a case of first impression under the statute, is in accord with the well settled principle that ordinarily corporate litigation must be conducted by and in the name of the corporation rather than its stockholders. Under that rule a stockholder desiring to litigate on behalf of his corporation first must show that he has been unable to induce the management of the corporation to litigate in the corporate name. It is this aspect of the derivative suit rule which was applied in the court below. American as the sole stockholder of Florida, and Bond and Share as the controlling stockholder of American, were in a position to cause the filing of such a petition by Florida, and in fact Florida has filed its petition in the Fifth Circuit.

Florida's right to seek review of the order is not in dispute and review on Florida's petition will fully protect the rights of petitioner.[4] The

[4] As we note below, we believe there is no substance in American's fears that American may have grounds for challenging the order not available to Florida.

only question here is whether controlling stockholders have, as petitioner contends, an independent standing to seek review of an order in addition to that available to the subsidiary against which the order is directed. Petitioner conceded in its argument in the court below that Bond and Share as the controlling stockholder of petitioner would have had a standing to file a petition for review of the order in the Second Circuit equal to that of petitioner to file in the First Circuit.[5] Limiting those in control of Florida to the two circuits unquestionably available under section 24 (a) (see note 3, p. 5, *supra*) does not present a question of sufficient importance to warrant review by this Court.

The opinion of the court below discusses broader aspects of the derivative suit rule in its application to minority as well as controlling stockholders, and this was in fact the issue in two cases in the Second Circuit Court of Appeals mentioned in petitioner's brief. Whatever may be the problem as to the rights of minority stockholders (cf. pp. 12–14, *infra*), the present case, dealing with the rights of a sole stockholder and lim-

[5] Indeed, if the limitations of the derivative suit rule are inapplicable, any company objecting to an order directly affecting it could always find a friendly stockholder willing to lend his name to a petition for review who resided in any one of the ten circuits which might seem to those directing the company's litigation policy a desirable forum for the review proceeding.

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ited in importance to a question of venue, is not an appropriate means for bringing to this court the broader problems in issue in the Second Circuit cases.

1. Florida, not American, is the company directly affected by the order and American's interest therein is only derivative through its ownership of stock of Florida. The provisions complained of direct Florida to make certain accounting entries. Nothing in the order requires American to do anything or to refrain from doing anything. American itself is not even mentioned in the paragraphs of the order sought to be reviewed. The only objections to the order stated in the petition for review are general allegations of lack of power of the Commission to enter such an order; objections to the effect of the order upon Florida; and objections to the alleged impairment of American's position as a stockholder of Florida by virtue of the effect of the order on Florida's ability to pay dividends. The only relief which the petition for review seeks or could seek is that Florida be relieved from complying with the requirements of the order. Thus American, while purporting to seek judicial review on its own behalf, is necessarily acting on behalf of Florida.

2. The controlling principles of law applicable to the conduct of corporate litigation preclude a petition for review by American on

behalf of Florida. The corporation as an entity is the sole person entitled to sue and be sued with respect to corporate rights, and the management, not the stockholders, is alone vested with authority to transact corporate business, including the conduct of litigation. Stockholders may bring derivative suits to invoke the aid of the courts for wrongs done to the corporation only where the directors have refused to sue, or where a demand that they do so would be unavailing; and where the refusal to sue amounts to a breach of trust or duty: *Hawes* v. *Oakland,* 104 U. S. 450, 460–461 (1882); *City of Detroit* v. *Dean,* 106 U. S. 537, 541–542 (1883); *United Copper Securities Company* v. *Amalgamated Copper Co.,* 244 U. S. 261, 263–264 (1917); *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 318–322 (1936) (also see concurring opinion of Justice Brandeis, concurred in by Justices Stone, Roberts, and Cardozo, at pp. 342–344). The stockholder can act only when the corporation refuses to act.

These principles are applicable here. Petitioner makes no showing that Florida has wrongfully refused to seek review and, of course, petitioner could not so allege in view of its complete control of Florida as its sole stockholder and the holder of all its voting power. As noted, Florida did subsequently file its separate petition for review.

3. The court below properly rejected petitioner's contention that Congress in providing for judicial review by "any person aggrieved" intended to render inapplicable the derivative suit rule. We know of no cases which support this proposition and petitioner has cited none. We freely concede that the term "person aggrieved" has been construed, in the context of particular statutes, as giving certain persons economically affected by administrative orders, but whose private rights are not invaded thereby, standing to seek judicial review of those orders for the purpose of vindicating public interests in conformity to the applicable statutory standard. Petitioner cites in that connection *Federal Communications Commission* v. *Sanders' Radio Station*, 309 U. S. 470 (1940); *Federal Communications Commission* v. *National Broadcasting Company*, 319 U. S. 239 (1943); and also *Associated Industries, Inc.* v. *Ickes*, 134 F. (2d) 694 (C. C. A. 2), dismissed as moot pursuant to remand by this court, 320 U. S. 707. These are all cases where the particular economic interest asserted could have no other private representation if the petitioner in question did not have standing to challenge the order. None of these cases involved rights of stockholders to seek review for violation of orders affecting their companies, and none of them contained any indication that the term "person aggrieved" should be construed

as breaking down well-settled limitations on the rights of stockholders to litigate on behalf of their corporations.[6]

To permit controlling stockholders, or stockholders who may be acting in collusion with the management, to file independent petitions for review of orders affecting their company would be to encourage maneuvering to pick jurisdictions for litigation.[7] The position contended for by

[6] Petitioner apparently does not press here the argument urged on the court below that its participation in the proceedings below was conclusive as to its standing to seek review of the Commission's order. American was a necessary party to the proceedings below because of other aspects of the case not involved in its petition for review. Under these circumstances American's being a party to the administrative proceedings cannot be construed as a determination by the Commission that it has any legal interest to challenge, as a person aggrieved, provisions in the orders directed only to Florida. In any event, no liberality on the part of an administrative agency in permitting the joinder of parties to a proceeding before it can enlarge the jurisdiction of the reviewing court. As was said in *Pittsburgh & West Virginia Railway Company* v. *United States*, 281 U. S. 479, 486:

"The mere fact that appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened legal injury to it."

[7] In our original brief in support of our motion to dismiss we stated (note 3, pp. 8–9):

"We do not undertake to interpret the reason for American rather than Florida electing to file the petition in this case. However, it may be significant that there are precedents adverse to petitioner's position in the circuit courts to which Florida is entitled to resort. *Alabama Power Co.* v. *Federal Power Commission*, 134 F. (2d) 602 (C. C. A. 5, 1943);

petitioner would thus lead to abuses comparable to the historic evils where stockholders' derivative suits were brought to create diversity of citizenship and thereby confer federal court jurisdiction over corporate controversies which should have been litigated in the state courts.*

4. We do not, of course, question the fact that petitioner as the sole stockholder of Florida has an economic interest as substantial as that of Florida. Nor do we question the fact that the term "person aggrieved" is broad enough to include the economic interest of a stockholder as a "person aggrieved" by an order affecting his company wherever the circumstances are such as to make it inequitable that the stockholder be bound by the action or inaction of the management. Problems of this kind arise in connection with petitions for review filed by minority stockholders and by other individual security holders. Accordingly, the Commission has not challenged,

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Alabama Power Co. v. *Federal Power Commission*, 136 F. (2d) 929 (C. C. A. 5, July 8, 1943); *Alabama Power Co.* v. *McNinch*, 94 F. (2d) 601 (App. D. C. 1937); *Alabama Power Co.* v. *Federal Power Commission*, 128 F. (2d) 280 (App. D. C. 1942), cert. denied, 317 U. S. 652 (1942)."

* This background of the requirement in former Equity Rule 27 and its predecessor, Equity Rule 94, of an affidavit that the action is not collusive to confer jurisdiction is discussed in *Hawes* v. *Oakland*, 104 U. S. 450, 452, decided January 16, 1882. Former Equity Rule 94 was promulgated January 23, 1882, 104 U. S. IX.

and the courts have assumed, the right of individual security holders, including stockholders, to seek judicial review of Commission orders in cases where the order in question affects the rights of different classes of security holders *inter sese*, or where there are charges of fraud against the management and the complaining stockholder. See *Lawless* v. *S. E. C.*, 105 F. (2d) 574 (C. C. A. 1, 1939); *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80 (1943); *New York Trust Co.* v. *S. E. C.*, 131 F. (2d) 274 (C. C. A. 2, 1942); *City National Bank & Trust Co.* v. *S. E. C.*, 134 F. (2d) 65 (C. C. A. 7, 1943); *Okin* v. *S. E. C.*, 137 F. (2d) 398 (C. C. A. 2, 1943).*

The Commission's motions to dismiss petitions for review by minority stockholders which were made in the two other cases entitled *Okin* v. *S. E. C.*, decided by the Second Circuit on July 10, 1944, and referred to on page 15 of the petition, were instances where the Commission believed that the petitions for review were predicated upon nothing more than a disagreement over managerial policy, and that the minority stockholder had failed to show any reason why he should be permitted to bring this dispute to the reviewing court. In the first of these cases the

* *Todd* v. *S. E. C.*, 137 F. (2d) 475 (C. C. A. 6, 1943), may be regarded as a borderline case. However, the Commission did not question the minority stockholder's standing in that case to seek review of a dissolution order pursuant to Section 11 (b) (2), not challenged by the company.

Second Circuit, expressly relying on the decision below, recognized the applicability of the derivative suit rule and granted our motion to dismiss. In the other case the motion to dismiss was denied, although the Court intimated that summary affirmance of the Commission's order might have been appropriate if the Commission had filed with the Court the transcript of the record.[10] As we have already indicated, this is a wholly different facet of the problem raised by petitioner and we believe it clear that there is no conflict between the views of the First and Second Circuits with respect to the issues raised by the instant petition.

6. There remains petitioner's contention that it is necessary to give American an independent standing to seek review of the Commission's order because of the possibility that American may be in a position to challenge the order on grounds not open to Florida. This contention rests on the

[10] The filing of a complete transcript would in this, and many other cases, be a burdensome and time-consuming task which should not be deemed a jurisdictional prerequisite to summary disposition of a frivolous petition. The Commission has, therefore, moved the Second Circuit to dismiss or affirm upon the same ground previously urged, but after the filing for purposes of the motion, of an abbreviated transcript (see Rule 75 (j) of the Rules of Civil Procedure). The granting of this new motion would render moot our disagreement with the earlier decision. Denial of the motion might warrant our filing a petition for a writ of certiorari. We will advise the Court promptly of any decision by the Second Circuit on this motion, and of any determination by the Government as to seeking review of the rulings of the Second Circuit. We call attention to

fact that the order complained of affects the earned surplus accounts of Florida, and therefore may affect the future distribution of earnings by Florida to its stockholder, American. By a process of reasoning which combines both reliance upon and disregard for the corporate fiction, petitioner has conjured up an imaginary conflict between the interest of Florida to retain earnings and the interest of its sole stockholder to receive these earnings as dividends. In its brief in the court below petitioner stated (p. 4), "Undoubtedly the Commission will contend that Florida cannot complain that American is being deprived of dividends as a result of the Orders." The Commission disclaimed the intention of making any such argument, stating (p. 4, reply brief):

> The Commission has not contended, and does not contend, that Florida lacks standing to seek judicial review of an order directing the manner in which it shall keep its accounts, and we recognize that among the matters which may properly be considered on such review is the question whether the order improperly interferes with any right of the corporation to pay dividends and of its stockholders to receive them, and with the value of its outstanding securities.

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these circumstances with the thought that the Court may wish to defer action on the present petition until it is in a position to consider the other aspects of the problem which are before the Second Circuit. Whatever the outcome of the other cases, however, we are of the view that the instant petition should be denied.

This position, as indicated in the opinion of the court below, was reaffirmed at the oral argument and we reaffirm it now. Nevertheless, petitioner urges that the point is one which an appellate court might raise on its own motion. These fears are predicated upon a colloquy between counsel for petitioner and one of the members of the Court which occurred in the course of oral argument of *Northwestern Electric Company* v. *Federal Power Commission*, 321 U. S. 119. However, we submit that, as the Court ultimately decided, the difficulty with petitioner's position in the *Northwestern Electric Company* case was the weakness on the merits of its contentions irrespective of whether urged in the name of the parent company or its subsidiary.[11]

When the merits of the accounting order involved in the present case come to be considered, it cannot be questioned that Florida, as the company immediately affected, has every right to challenge the order in so far as it may be shown to be arbitrary or unreasonable or in excess of statutory authority. We cannot believe there-

[11] That case involved the validity of a Federal Power Commission order affecting the accounts of an operating company. The operating company and its parent holding company joined in the petition for review of that order which was filed in the Circuit Court of Appeals appropriate for the operating company. No question was raised as to the standing of the parent operating company to join in the petition for review. On the merits of the *Northwestern* case petitioners were unsuccessful in their effort to persuade this Court that the Federal Power Commission in enforcing an accounting system based on cost may not require a subsidiary "public

fore that any different result would be reached upon review depending upon whether it is American or Florida which is the company complaining of the order.[12]

Moreover, even if there were any substance to the fears of American, this difficulty could have been met by American joining with Florida in a petition for review filed in a Circuit Court of Appeals appropriate for Florida. This course was followed by the petitioner in the *Northwestern Electric Company* case, and there may still be open to American intervention in the proceeding in the Fifth Circuit.[13] We regard intervention by American as theoretically inappropriate because unnecessary to protect any substantive rights. However, no inconvenience could result from such interven-

utility" to adjust the carrying value of its assets to an amount not in excess of cost to such public utility, if it appears that a parent holding company has paid for the stock of such public-utility company a sum in excess of underlying book value.

[12] This does not mean, of course, that the reviewing court should assume that any impact of the order on Florida's ability to distribute its earnings in dividends is *pro tanto* equivalent to deprivation of either Florida or its stockholder of the amount so restricted. Corporate management itself may frequently prefer, as in the best interest of its stockholders, the choice of the more conservative of two possible accounting theories notwithstanding the fact that this choice may compel the retention in the business of what might otherwise be recorded as distributable earnings.

[13] It is possible that persons who are parties to the administrative proceeding may be properly permitted to participate in the review of an administrative order although lacking an independent status to challenge such an order. This result

tion and it may be desirable to obviate any ruling as to the substantive consequences of intervention in advance of the ultimate decision on the merits. Accordingly, we will not oppose intervention by American, if sought.

CONCLUSION

The decision below is correct and does not warrant review by this court.

Respectfully submitted,

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has been reached under the somewhat different statutory provisions governing review of orders of the Interstate Commerce Commission. In *Alexander Sprunt & Son, Inc.* v. *United States*, 281 U. S. 249, it was held that shippers whose competitive advantage was threatened by the Interstate Commerce Commission's order directing the correction of an allegedly discriminatory rate had sufficient interest to participate in an administrative proceeding directed against the carriers, and in an equity suit by the carriers to challenge an order, but not to sue in their own right. The Court said (p. 255):

"Having this interest, they were entitled to intervene in that administrative proceeding. And if they did so, they became entitled under § 212 of the Judicial Code to intervene, as of right, in any suit 'wherein is involved the validity' of the order entered by the Commission. But that interest alone did not give them the right to maintain an independent suit, to vacate and set aside the order."

APPENDIX

The Public Utility Holding Company Act of 1935, Act of August 26, 1935, c. 687, title I, 49 Stat. 803 (15 U. S. C. 79), provides:

Section 15 (f):

> All accounts, cost-accounting procedures, correspondence, memoranda, papers, books, and other records kept or required to be kept by persons subject to any provision of this section shall be subject at any time and from time to time to such reasonable periodic, special, and other examinations by the Commission, or any member or representative thereof, as the Commission may prescribe. The Commission, after notice and opportunity for hearing, may prescribe the account or accounts in which particular outlays, receipts, and other transactions shall be entered, charged, or credited and the manner in which such entry, charge, or credit shall be made, and may require an entry to be modified or supplemented so as properly to show the cost of any asset or any other cost.

Section 20 (a):

> The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as it may deem necessary or appropriate to carry out the provisions of this title, including rules and regulations defining accounting, technical, and

trade terms used in this title. Among other things, the Commission shall have authority, for the purposes of this title, to prescribe the form or forms in which information required in any statement, declaration, application, report, or other document filed with the Commission shall be set forth, the items or details to be shown in balance sheets, profit and loss statements, and surplus accounts, the manner in which the cost of all assets, whenever determinable, shall be shown in regard to such statements, declarations, applications, reports, and other documents filed with the Commission, or accounts required to be kept by the rules, regulations, or orders of the Commission, and the methods to be followed in the keeping of accounts and cost-accounting procedures and the preparation of reports, in the segregation and allocation of costs, in the determination of liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the keeping or preparation, where the Commission deems it necessary or appropriate, of separate or consolidated balance sheets or profit and loss statements for any companies in the same holding-company system.

U. S. GOVERNMENT PRINTING OFFICE: 1934

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 470

AMERICAN POWER & LIGHT COMPANY, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

OPINIONS BELOW

The opinion of the Commission rendered December 28, 1943, the order of the same date (R. 8–12), and the order dated January 12, 1944 (R. 12–13), denying the petitioner's application for rehearing, have not yet been officially reported but have been published as Holding Company Act Releases Nos. 4791, 4824 (containing corrections), and 4825 (denying rehearing).[1] The opinion of

[1] Copies of the findings and opinion of the Commission as corrected are lodged with the Clerk of this Court. A supplemental order dated January 11, 1944, published as Holding Company Act Release No. 4828, was not challenged in the court below.

the Circuit Court of Appeals for the First Circuit is reported at 143 F. (2d) 250.

JURISDICTION

The decree of the circuit court of appeals dismissing the petition for review was entered on June 19, 1944 (R. 26). The petition for a writ of certiorari was filed on September 16, 1944, and granted on November 13, 1944 (R. 26). The jurisdiction of this Court is invoked under Section 24 (a) of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 834–835, 15 U. S. C. 79x (a)), and Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTE INVOLVED

The portions of respondent's order which petitioner seeks to have reviewed were entered under Sections 15 (f) and 20 (a) of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. 79, herein referred to as the "Act"). The text of these provisions is set forth in the Appendix, *infra*, pp. 28–30. Section 24 (a) of the Act provides in pertinent part:

> Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by

filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. * * *

QUESTION PRESENTED

Whether a sole stockholder of a company ordered by the Commission to effect accounting adjustments by means of charges to earned surplus is a person "aggrieved" by such order within the meaning of Section 24 (a) of the Holding Company Act and is entitled as such to file an independent petition for review of such order.

STATEMENT

The petitioner, American Power & Light Company, incorporated in the State of Maine, is a subsidiary holding company in the Electric Bond and Share holding-company system and is itself a registered holding company. It is now, and was at the time of filing the petition for review, the sole stockholder of Florida Power & Light Com-

pany, which is an electric and gas utility company incorporated in and operating exclusively in Florida.[2]

The order under review was entered in administrative proceedings in which there were consolidated, for purpose of hearing, issues raised by the Commission as to whether it was necessary for Florida to effect changes in its accounts and security structure under applicable provisions of the Act, with proposals of Florida and American to meet those issues by what petitioner has characterized as a "financial reorganization" (R. 1–2, 8–9). The steps proposed by Florida and American and approved by the Commission include the elimination of "write-ups" in the accounts of Florida, capital contributions by American to Florida through surrender of certain debt securities and preferred stocks of Florida held by American, and the issuance and sale to the public of new bonds, debentures, and notes of Florida to "refund" the then outstanding publicly held bonds and preferred stocks of Florida (R. 10–11). While these proposals met in a manner satisfactory to the Commission most of the issues which it had raised, there remained a dispute as to the necessity of Florida's making certain additional accounting adjustments. The particular paragraphs of the Commission's order under review,

[2] Petitioner and the above-mentioned associate companies are hereinafter referred to, respectively, as American, Bond and Share, and Florida.

requiring such additional accounting adjustments provide that (R. 10–11):

> (2) It is Further Ordered that Florida Power & Light Company shall classify in Account 107 and eliminate from the plant account by charge to earned surplus not later than December 31, 1944, an amount of $1,815,655 consisting of capitalized intra-system profits paid to affiliated companies as construction and engineering fees;[3]
>
> * * * * *
>
> (4) It is Further Ordered that pending final determination of the amount and disposition to be made of Account 100.5 items presently in the plant account of Florida, Florida shall annually beginning with the calendar year 1944 appropriate out of earned surplus to a contingency reserve at least $700,000, such act of appropriation to be without prejudice, however, to respondents' right to contest the validity of any definitive order with respect to such items as may ultimately be issued;[4]

Paragraph 5 of the order (R. 11) makes these provisions severable from the remaining paragraphs of the order, and compliance therewith is ex-

[3] "'Write-ups' and other elements of book value which are deemed illegitimate" are placed in Account 107. Kripke, *A Case Study in the Relationship of Law and Accounting: Uniform Accounts 100.5 and 107* (1944), 57 Harv. L. Rev. 433, 436.

[4] "The difference between the cost to the accounting utility of property acquired as an operating unit or system and original cost less depreciation" is placed in Account 100.5. *Ibid.*

pressly stated not to be a condition to the granting of the applications of American and Florida to take the other action contemplated.

On February 5, 1944, after consumation of the "reorganization", American filed its petition in the Circuit Court of Appeals for the First Circuit seeking to set aside paragraphs 2 and 4 of the order of December 28, 1943 (R. 1). On February 24, 1944, the Commission filed its motion to dismiss the petition, pointing out that "the Commission does not challenge the right of petitioner's subsidiary Florida Power & Light Company to seek review of this order, which is specifically directed to it", and that "we have given notice of our motion to petitioner in ample time for it to cause its subsidiary to file its petition for review in an appropriate circuit" (R. 14).[5] On February 25, 1944, Florida filed its petition for review in the United States Circuit Court of Appeals for the Fifth Circuit. It challenged the same paragraphs of the Commission's order which American seeks to have set aside (R. 14, 19–20).

On June 19, 1944, the court below dismissed American's petition for review (R. 26).

SUMMARY OF ARGUMENT

American's only interest in the order under review is derivative; its interest derives from its

[5] The venue provisions of Section 24 (a) limit Florida to filing a petition for review either in the United States Court of Appeals for the District of Columbia or in the Circuit Court of Appeals for the Fifth Circuit.

holdings in Florida against whom alone the order is directed. In dismissing American's petition, the court below applied the well-settled principle of corporate law that, absent special considerations making it inequitable that a stockholder be concluded by the action or inaction of the management, corporate litigation may be conducted only by and in the name of the corporation. No special equitable considerations are present here since American, as Florida's stockholder, has complete control over the management of Florida and thus has the power to cause Florida to seek review and to control the conduct of any litigation by which Florida may seek to challenge the order. To hold that a parent holding company may nevertheless file a petition to review an order directly affecting its subsidiary would circumvent venue restrictions imposed by the statute.

American urges that an order affecting the earned surplus of Florida, and consequently its ability to pay dividends, creates a conflict of interest between the corporation as such and its stockholders which gives any stockholder a special standing to attack such order. But at least in the case of American, which is a sole stockholder, there can be no such conflict. The right to and interest in judicial review is Florida's and only Florida may assert it.

American's contention that the statutory provision for review of Commission orders by "any person or party aggrieved" gives a stockholder an

independent standing to petition for review without regard to the traditional limitations upon the conduct of corporate litigation, is without basis in the statute and would contravene the venue provisions thereof. Equally without basis is American's position that, whether or not otherwise "aggrieved," it acquired standing to seek review of this order by virtue of its standing as a party to the administration proceeding in which the order was entered. Participation before the Commission by virtue of a flexible administrative procedure cannot operate to enlarge the jurisdiction of a reviewing court, especially when American was a necessary party only for the determination of issues which are unrelated to the provisions of the order now challenged.

ARGUMENT

I

AMERICAN'S SOLE INTEREST IN THE ORDER UNDER REVIEW IS DERIVATIVE

The order under review requires Florida, and Florida alone, to make changes in its accounts. The order neither requires nor prohibits action by American. American is not even mentioned in the paragraphs of the order sought to be reviewed. The only relief which petitioner seeks is that Florida, not American, be relieved of restraints imposed by the order. An order of a reviewing court which did not relieve Florida of its obligation to comply with the order could not have any

effect upon the "interest" which American seeks to assert. Thus the petition is derivative both in the sense that American's interest in the order derives solely from its stock interest in Florida and in that the relief sought is relief on behalf of Florida from restrictions otherwise applicable to it. See 13 Fletcher, *Corporations* (1943), secs. 5911–5915.

The order under review does not deal with the rights of classes of stockholders, *inter sese*, as does an order approving, for example, a plan of reorganization or recapitalization. If such an order were involved, we would not question the standing of even a controlling stockholder to seek review. Thus the Commission did not challenge the status of Chenery Corporation, a parent holding company, and other interests affiliated with the management of Federal Water Service Corporation to challenge an order treating their stockholdings as a special class for purposes of participation in a plan. See *S. E. C.* v. *Chenery Corporation*, 318 U. S. 80. Nor does the Commission question the standing of minority stockholders to object to the treatment of their class in a reorganization.*

* Where the district court enforcement procedure under Section 11 (e) is applicable, the appropriate procedure is that followed in *Otis & Co.* v. *S. E. C.*, No. 81, decided January 29, 1945, wherein the objecting stockholder challenged the plan in a district court and appealed from the district court's order approving and enforcing the plan. See *Okin* v. *S. E. C.*, 145 F. 2d 206 (C. C. A. 2), dismissing a petition to review filed in a circuit court of appeals while the district court's enforcement proceeding was in progress.

Cases in which the Commission has not challenged the standing of security holders or their representatives to attack orders affecting the rights of security holders, *inter sese*, or involving charges of fraud against the management are: *Lawless* v. *S. E. C.*, 105 F. 2d 574 (C. C. A. 1); *New York Trust Company* v. *S. E. C.*, 131 F. 2d 274 (C. C. A. 2), certiorari denied, 318 U. S. 786; *City National Bank & Trust Co.* v. *S. E. C.*, 134 F. 2d 65 (C. C. A. 7); *Okin* v. *S. E. C.*, 137 F. 2d 398 (C. C. A. 2).[7] It is not disputed, however, that the instant order is one which does not deal with the rights of security holders, *inter sese;* nor, of course, is there any charge of fraud or breach of duty on the part of Florida. Under these circumstances it is clear that the injury feared by petitioner is only "the indirect harm which may result to every stockholder from harm to the corporation." See *Pittsburgh & West Virginia Railway Company* v. *United States*, 281 U. S. 479, 487.

American urges that there is a conflict of interest between Florida as a corporation and American as its stockholder with respect to the order (Br. 8-10, 15), and that relief may be foreclosed entirely in the event that Florida is held to have no standing to petition for review (Br.

[7] *Todd* v. *S. E. C.*, 137 F. 2d 475 (C. C. A. 6), may be regarded as a borderline case. However, the Commission did not question the minority stockholder's standing to seek review of a dissolution order issued pursuant to Section 11 (b) (2) and not challenged by the company.

16). We submit that any conflict of interest between Florida and its sole stockholder is an imaginary one both in law and in fact, and that it is perfectly clear that Florida may invoke judicial review. As a practical matter, American, as the sole stockholder, can direct and has directed Florida to challenge the order to "*retain* money as against its stockholder" (Br. 10), even though the order is assumed by petitioner to be favorable to Florida and injurious to it.

In law, likewise, it is clear that Florida has as much interest as American in upsetting the Commission's order and is fully competent to assert any objections to that order which could be validly urged by its stockholder. Obviously, the right of the corporation to pay dividends is an important right susceptible of judicial protection, at the insistence of the corporation, against administrative restraint that can be shown to be arbitrary or in excess of statutory power. This Court has repeatedly reviewed accounting orders and accounting regulations at the instance of complaining corporations directly affected, without raising any question as to the competence of such corporations to bring suit. See, e. g., *American Tel. & Tel. Co.* v. *United States*, 299 U. S. 232; *Norfolk & Western Ry. Co.* v. *United States*, 287 U. S. 134. The order reviewed in the *American Tel. & Tel. Co.* case contained provisions of the same general character as the order under review in the present instance. But what American

appears to be seeking is a putative rhetorical advantage which might flow from focussing attention upon the impact of the order upon the stockholder as a potential recipient of dividends, rather than upon the corporation which might otherwise be the payor of dividends. By a process of reasoning which both utilizes, and at the same time ignores, the corporate fiction, American would have it appear that it is being deprived of dividends for the benefit of some completely unrelated entity. But whether the order is challenged by American or by Florida it must stand or fall upon the power of the Commission to require the accounting entries in question under the appropriate provisions of the Holding Company Act. The extent of the Commission's power cannot vary, depending on whether a challenge to the order comes from Florida as a potential declarant of dividends or from American as a potential recipient of such dividends.[8]

Thus, whether or not the order under review necessarily operates as a restriction on Florida's power to declare and pay dividends,[9] Florida is

[8] As we suggested in our brief in opposition to the granting of the writ (p. 17), denial of American's standing to file an independent petition in the First Circuit would not necessarily deprive it of an opportunity of joining by intervention in the proceeding for review instituted by Florida in the Fifth Circuit.

[9] It is common practice for a growing utility company to retain part of its earnings for reinvestment in the business and it may well be that the charges to earned surplus re-

fully competent to challenge it directly and American has shown no need for any independent standing to challenge the order, and no interest in the order other than such as derives from its position as a stockholder of American.[10]

NY Pa NJ Utilities Co. v. *Public Service Commission of New York*, 23 F. Supp. 313 (S. D. N. Y.), squarely supports the view that the right

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quired by the Commission's order—whatever their effect on the legal power of Florida to pay dividends (see Rule U–46, Appendix, *infra*, p. 30)—will not in fact result in the retention of funds which, apart from the order, its management would distribute. Cf. *Report of the Public Utilities Division, S. E. C., Financial Statistics for Electric and Gas Subsidiaries of Registered Public-Utility Holding Companies, 1943*, p. 1. It should be noted, moreover, that American's ultimate equity increases in direct proportion to the extent that net earnings are retained by Florida.

[10] Petitioner is not satisfied by disclaimers on the Commission's part as to lack of any intention to challenge Florida's standing to attack the order, but professes to fear objections which the court might raise on its own motion. In that connection, it refers to a colloquy with one of the Justices, which occurred in the course of the argument in *Northwestern Electric Co.* v. *Federal Power Commission*, 321 U. S. 119. In that case, American, which had been permitted by the Federal Power Commission to intervene in a proceeding involving the accounts of its subsidiary, joined in its subsidiary's petition for review. Pursuant to the venue requirements of the Federal Power Act, that petition was necessarily filed in the circuit appropriate for the subsidiary and no question could arise as to the parent company's independent status to seek review in another circuit. The ultimate disposition of the case indicates that the real difficulty with petitioners' argument in that case was its inherent lack of substance irrespective of whether it might be conceived of as the complaint of the accounting company or that of its holding company.

which American here asserts is purely derivative. In dismissing the complaint of the beneficial owner of all the stock of an operating company upon which the Public Service Commission had imposed a dividend restriction, Judge Coxe said (p. 314):

> The sole object of the action is to remove the dividend restriction imposed by the Commission upon the Rochester Company; that, in effect, is the only relief asked in the complaint, and the real purpose of the suit. * * * the only interest the plaintiff now has in seeking its removal is as a holder of voting trust certificates representing stock in the company. I think it is plain, therefore, that the plaintiff is suing in the right of the corporation, and that the action is derivative.

II

THE STATUTORY PROVISION FOR REVIEW OF COMMISSION ORDERS BY "ANY PERSON OR PARTY AGGRIEVED" DOES NOT SET ASIDE TRADITIONAL LIMITATIONS ON THE CONDUCT OF CORPORATE LITIGATION

The term "person aggrieved" or some similar phrase is used to describe persons entitled to seek review of administrative orders in many federal statutes other than the Public Utility Holding Company Act of 1935.[11] Under none of these

[11] See Communications Act of 1934, 48 Stat. 1093, sec. 402 (b) (2), 47 U. S. C. 402 (b) (2); National Labor Relations Act, 49 Stat. 455, sec. 10 (f), 29 U. S. C. 160 (f); Securities.

statutes has it been held that the "person aggrieved" test gives stockholders of a company directly affected by an administrative order a standing to sue without regard to the traditional limitations applicable to the conduct of corporate litigation. Cf. *Price* v. *Gurney*, No. 410, decided February 5, 1945.

Petitioner apparently argues that the "person aggrieved" language should be construed as requiring the reviewing court, contrary to well-settled principles of corporate law, to take cognizance of the indirect injury to stockholders resulting from any injury to a corporation and to treat each stockholder as thereby necessarily "aggrieved" for purposes of filing a petition to review. Thus it is the "substantial adverse economic effect on American" rather than the invasion of its legal rights which petitioner emphasizes; and, in asserting that the question of whether it is "aggrieved" is not even debatable, American urges "this would be true even if Amer-

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Act of 1933, 48 Stat. 80, sec. 9 (a), 15 U. S. C. 77i; Trust Indenture Act (1939), 53 Stat. 1175, sec. 322 (a), 15 U. S. C. 77 vvv (a); Securities Exchange Act, 48 Stat. 901, sec. 25 (a), 15 U. S. C. 78y (a); Investment Company Act (1940), 54 Stat. 844, sec. 43 (a), 15 U. S. C. 80a–42 (a); Investment Advisers Act (1940), 54 Stat. 855, sec. 213 (a), 15 U. S. C. 80b–13 (a); Fair Labor Standards Act, 52 Stat. 1065, sec. 10 (a), 29 U. S. C. 210 (a); Railroad Retirement Act of 1937, 50 Stat. 315, sec. 11, 45 U. S. C. 228k; Natural Gas Act, 52 Stat. 831, sec. 19 (b), 15 U. S. C. 717r (b); and Federal Power Act, 49 Stat. 860, sec. 313 (b), 16 U. S. C. 8251 (b).

ican suffered no injury from the Commission's order other than through the effect of the order on Florida, of which American is the sole stockholder" (Br. 8). The consequences upon acceptance of this argument are discussed more fully in the brief for the Commission (pp. 18–28) in *Securities and Exchange Commission* v. *Okin*, No. 815, this Term. It is our view that the term "person aggrieved" contains no specific indication of congressional intention with respect to standing to sue, but indicates a deliberate intention on the part of Congress to leave this problem to the reviewing courts, to be determined in the light of traditional legal principles as well as the overall policy of the particular statute in question.

We do not, of course, question that the term "person aggrieved" has been construed, in the context of particular statutes, as giving certain persons economically affected by administrative orders but whose private substantive rights were not deemed to have been invaded thereby, standing to seek judicial review of those orders for the purpose of vindicating public interests in conformity with the applicable statutory standard. Petitioner has cited in that connection *Federal Communications Commission* v. *Sanders Radio Station*, 309 U. S. 470; *Federal Communications Commission* v. *National Broadcasting Company*, 319 U. S. 239; and *Associated Industries, Inc.* v. *Ickes*, 134 F. 2d 694 (C. C. A. 2), dismissed

as moot pursuant to remand by this Court, 320 U. S. 707. But these are cases where the particular economic interest asserted could have no other private representation if the petitioner in question did not have standing to challenge the order. In the cases under the Communications Act, the lack of legal interest flowed from the substantive policy of the statute which does not permit broadcasters to acquire vested rights in the use of particular wave lengths. But the statutory provisions for judicial review would have been virtually meaningless unless the economic interests most seriously concerned were held to have standing to challenge orders of the regulatory Commission.[12] The *As-*

[12] The cases may rest on an interpretation of the statute as conferring on the broadcasting industry, in its use of facilities of communication not susceptible of private appropriation, a substantive right to be protected against arbitrary and discriminatory treatment by governmental authority. Thus, under the Communications Act, Congress has merely made applicable procedurally, if not substantively, the concept that a public utility company may have standing to challenge the granting of a license to a competitor. See *Alton R. Co.* v. *United States*, 315 U. S. 15, 18–20; *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382, 390. Assuming that no private substantive right can be conceived of as existing under these circumstances, the explanation may be that the statute should be construed as conferring upon the private interests most directly affected the status of a "private Attorney General." See *Associated Industries, Inc.* v. *Ickes*, 134 F. 2d 694, 704. Where, however, the regulatory scheme, while based on public interest standards, is one to regulate private investment interests, it is not lightly to be assumed that Congress intended to vest standing to sue in the public interest in any person other than the designated

sociated Industries case merely involved the problem of whether the publicly appointed "Consumers' Counsel" should be deemed the exclusive representative of consumers' interests for the purpose of challenging minimum price orders. None of these cases construed the concept of "aggrieved" as applicable to a stockholder's interest in corporate rights, nor did they involve the problem of whether the statute in question was intended to permit stockholders to displace, or compete with, the corporation and its management for the purpose of challenging administrative orders directly affecting the company.

The ultimate question presented here is whether there is anything in the purposes of the Public Utility Holding Company Act which requires such an unprecedented result, particularly in the case of a controlling stockholder. We believe that there is no basis in the Act for such a result, and, moreover, that it would have the effect of circumventing the venue provisions of the Act. It may be helpful before examining the problem in the specific context of the venue provisions of the Holding Company Act to review the reasons

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administrative agency. Certainly it would be difficult to construe the statute as conferring such a standing upon parent holding companies in respect of orders affecting their subsidiaries when the subsidiaries have a conventional legal interest in challenging such orders. Nor does petitioner attempt to invoke public interest standards as a basis for challenging the Commission's action.

for the traditional limitations upon conduct of corporate litigation by stockholders. In the first place it should be noted that what is involved is a basic and well-settled principle of corporation law which applies in the absence of some affirmative justification for creating exceptions to the rule. The rule has been compactly stated by a leading text writer:

> Contrast the law of corporations with respect to suits against, or by, strangers. It is very simple. Rights are in the corporation, not in its members, so that it, not they, is the party plaintiff. And obligations are against the corporation, not its members, so that it, not they, is the party defendant. [See Warren, *Corporate Advantages without Incorporation*, p. 23.]

Departure from the rule has been permitted only upon special equitable grounds and these equitable grounds have been based exclusively upon the necessity of protecting minority, rather than controlling, stockholders against abuse of managerial powers.[13] Like the instances where courts "pierce the veil of corporate entity" or disregard the "corporate fiction", the purpose of the rule is to prevent abuse of corporate devices or corporate powers, not to permit those in control of the corporation to assume, alternatively, the corporate or individual personality to suit their own

[13] See McLaughlin, *Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit* (1936), 46 Yale L. J. 421, 423.

convenience."[14] And the fact that the stockholder owns all of the corporate stock makes for no different treatment. See *Button* v. *Hoffman*, 61 Wis. 20.

The policy which precludes those in control of the corporation from bringing suit in its behalf has found expression principally in decisions which have thwarted collusive efforts by those aligned in interest with the management to use the device of a derivative stockholder's suit to circumvent limitations which would be applicable to the corporation itself. A conspicuous example has been the attempt to create diversity of citizenship for purposes of suits in the federal courts, as described in *Hawes* v. *Oakland*, 104 U. S. 450, 452. This practice appears to have been the occasion for the enactment, in the same year as that decision, of former Equity Rule 94, which is the predecessor of Rule 23 (b) of the Rules of Civil Procedure. See 104 U. S. IX. Since that rule requires exhaustion of the corporate remedy by making a demand on the management or a showing that demand would be futile, it clearly precludes suit by a controlling stockholder.

The same considerations are applicable to attempts by parent holding companies, in their ca-

[14] Wormser has characterized stockholders' suits for mismanagement, as well as suits dealing with their rights *inter sese*, as an aspect of disregard of the concept of corporate entity but one in which the disregard is "incidental rather than fundamental." Wormser, *The Disregard of the Corporate Fiction and Allied Corporate Problems*, p. 78.

pacity as stockholders, to seek review of administrative orders affecting their subsidiaries in circuit courts of appeals to which their subsidiaries could not directly resort. The venue provisions of Section 24 (a) permit the filing of a petition for review, at the election of the petitioner, in either the Court of Appeals for the District of Columbia or in any circuit wherein the petitioner "resides or has his principal place of business." Petitioner as a Maine corporation filed its petition in the First Circuit, whereas Florida was limited by the statute to filing either in the Fifth Circuit or the District of Columbia. If petitioner is right in contending that the economic interest of a stockholder is sufficient to give standing to sue, there is no reason for stopping at the immediate parent of the corporation directly affected by an administrative order, and here petitioner's parent, Electric Bond and Share Company, which is a New York company, would have the further choice of petitioning for review in the Second Circuit. Indeed, if stockholders may petition for review, it would normally be possible to find a stockholder friendly to the management residing within the jurisdiction of any one of the ten circuit courts of appeals. It would be strange indeed if a statute primarily directed at the elimination of abuses in connection with the holding company device were to be construed as permitting parent holding companies to transcend

traditional limitations of corporate law which would otherwise preclude such choice.[18]

It is no answer to suggest, as petitioner does (Br. 17), that the Commission could file the transcript of record with the circuit court of appeals for the circuit of residence of the company principally affected, here the Fifth Circuit. Were the stockholder's standing to petition clear, it might well be that the corporation would never file an independent petition and thus never give the Commission an opportunity to file the transcript with the circuit court of appeals of the corporation's residence. Indeed, in this case, Florida did not file its petition until after the Commission filed its motion to dismiss American's petition in the First Circuit. Nor is it to be assumed that Congress could have intended to encourage, without substantial reason therefor, the filing of separate petitions in different circuits to review the same administrative order. While it is true that the cases cited by petitioner (Br. 18) do indicate that practical solutions have been reached in a number of cases where there have

[18] It may be significant that there are precedents adverse to petitioner's position in the courts of appeals to which Florida is entitled to resort. *Alabama Power Co.* v. *Federal Power Commission*, 134 F. 2d 602 (C. C. A. 5); *Alabama Power Co.* v. *Federal Power Commission*, 136 F. 2d 929 (C. C. A. 5); *Alabama Power Co.* v. *McNinch*, 94 F. 2d 601 (App. D. C.); *Alabama Power Co.* v. *Federal Power Commission*, 128 F. 2d 280 (App. D. C.), certiorari denied, 317 U. S. 652.

been dual filings, the procedure involved is at best a cumbersome one and at worst may give rise to jurisdictional controversies and disputes unrelated to the merits of the order under review.

Petitioner's theory as to the meaning of "person aggrieved" would permit of no limitation whatever on the circumstances under which minority stockholders might sue to challenge administrative action affecting their companies. Cf. *Securities and Exchange Commission* v. *Okin*, No. 815, to be argued immediately after this case. Its contention that economic interest (as ascertained by piercing the corporate veil) is enough to constitute a stockholder a "person aggrieved" would, of course, apply to minority stockholders as well as to controlling stockholders, and in its application to minority stockholders would likewise transcend traditional limitations on the conduct of corporate litigation. Thus petitioner's theory would permit minority stockholders to file independent petitions to review administrative orders even in cases where the management has caused a petition to be filed in the name of the corporation. It would also give unrestricted standing to sue to minority stockholders who happened to disagree with the management's decision not to litigate with respect to a particular order. As we show in our brief in the *Okin* case (No. 815), the application to petitions for review of the rules otherwise applicable to derivative actions would be in accordance with the traditional

policy under which courts have refused to concern themselves with disputes over mere differences as to managerial policy.[16] But even if this Court should agree with the holding of the Second Circuit in the *Okin* case, that court, in *Okin* v. *Securities and Exchange Commission*, 143 F. 2d 943, indicated its own concurrence in the holding of the First Circuit in the instant case, and, whatever reasons might prompt extension of standing to sue to minority stockholders would not apply to a controlling stockholder.

III

PETITIONER'S STATUS AS A PARTY TO THE CONSOLIDATED PROCEEDING IN WHICH THE ORDER UNDER REVIEW WAS ENTERED DOES NOT GIVE IT STANDING TO PETITION FOR REVIEW

The petitioner makes some point of the fact that American was a party to the proceeding before the Commission and derives from this a right to petition for review (Br. 9). We agree, of course, that anyone entitled of right to be heard before the Commission is entitled to review if he is aggrieved. However, administrative procedure is flexible. There is no provision in the statute

[16] As we conceded in our brief in opposition (p. 12) we do not question that "the term 'person aggrieved' is broad enough to include the economic interest of a stockholder as a 'person aggrieved' by an order affecting his company wherever the circumstances are such as to make it inequitable that the stockholder be bound by the action or inaction of the management."

which required that American be made a party to a proceeding affecting only the accounts of one of its subsidiary companies.[17] The Commission's exercise of its discretion to permit any person to become a party whose participation it believes would or might be helpful to it can have no effect upon whether persons thus permitted to participate can be "a person or party aggrieved". The Commission has no power to enlarge or circumscribe the jurisdiction of the reviewing court by the exercise of such discretion.

In the present case, the order appealed from was entered in a general proceeding for securing compliance with the Act by a segment of the Bond and Share system. Had there been a separate proceeding for purposes of the particular sections of the order under review, there would have been no occasion for the Commission to name American a party. It did not take affirmative action to

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[17] Section 19 provides in part:

> In any proceeding before the Commission, the Commission * * * may admit as a party any representative of * * * security holders or any other person whose participation in the proceedings may be in the public interest or for the protection of investors or consumers.

Even if this language should be construed as not conferring an unlimited discretion on the Commission to exclude participation, it could scarcely be regarded as an abuse of Commission discretion to exclude from separate participation the person in control of the corporation directly affected by the proceeding and whose interests are therefore adequately represented by its management.

eliminate as parties either American or Bond and Share because these companies were necessary parties to other aspects of the transaction under consideration and approved or required in the same order as the provisions now objected to by American. Under the circumstances, the fact that American was a party did not constitute even an administrative determination that American had any standing to object to the accounting provisions of the order. The mere fact that a stockholder is a party does not of itself entitle the stockholder to institute an independent suit to set aside the Commission's order. This is clear from the case of *Pittsburgh & West Virginia Ry. Co.* v. *United States*, 281 U. S. 479. There, the petitioner, a minority stockholder of the Wheeling & Lake Erie Railroad, sought, under the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 219–20, to set aside an order of the Interstate Commerce Commission approving an application made by the company. This Court said (p. 486):

> The mere fact that appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened legal injury to it.

See also *Alexander Sprunt & Son, Inc.* v. *United States*, 281 U. S. 249, 255; *Boston Tow Boat Co.* v. *United States*, 321 U. S. 632, 633–634.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be affirmed.

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Securities and Exchange Commission.

MARCH 1945.

APPENDIX

The Public Utility Holding Company Act of 1935, Act of August 26, 1935, c. 687, title I, 49 Stat. 803 (15 U. S. C. 79), provides:

Section 12 (c):

> It shall be unlawful for any registered holding company or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to declare or pay any dividend on any security of such company or to acquire, retire, or redeem any security of such company, in contravention of such rules and regulations or orders as the Commission deems necessary or appropriate to protect the financial integrity of companies in holding-company systems, to safeguard the working capital of public-utility companies, to prevent the payment of dividends out of capital or unearned surplus, or to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder.

Section 15 (f):

> All accounts, cost-accounting procedures, correspondence, memoranda, papers, books, and other records kept or required to be kept by persons subject to any provision of this section shall be subject at any time and from time to time to such reasonable periodic, special, and other examinations by the Commission, or any member or representative thereof, as the Commission may prescribe. The Commission, after notice and opportunity for hearing, may prescribe the

account or accounts in which particular outlays, receipts, and other transactions shall be entered, charged, or credited and the manner in which such entry, charge, or credit shall be made, and may require an entry to be modified or supplemented so as properly to show the cost of any asset or any other cost.

Section 20 (a):

The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as it may deem necessary or appropriate to carry out the provisions of this title, including rules and regulations defining accounting, technical, and trade terms used in this title. Among other things, the Commission shall have authority, for the purposes of this title, to prescribe the form or forms in which information required in any statement, declaration, application, report, or other document filed with the Commission shall be set forth, the items or details to be shown in balance sheets, profit and loss statements, and surplus accounts, the manner in which the cost of all assets, whenever determinable, shall be shown in regard to such statements, declarations, applications, reports, and other documents filed with the Commission, or accounts required to be kept by the rules, regulations, or orders of the Commission, and the methods to be followed in the keeping of accounts and cost-accounting procedures and the preparation of reports, in the segregation and allocation of costs, in the determination of liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and non-

recurring income, in the differentiation of investment and operating income, and in the keeping or preparation, where the Commission deems it necessary or appropriate, of separate or consolidated balance sheets or profit and loss statements for any companies in the same holding-company system.

Rule U–46, promulgated by the Commission under Section 12 (c), provides, in pertinent part:

> (a) *Dividends.*—No registered holding company or subsidiary thereof shall declare or pay any dividend on any security of such company out of capital or unearned surplus, except pursuant to a declaration notifying the Commission of the proposed transaction, which has become effective in accordance with the procedure specified in Rule U–23, and pursuant to the order of the Commission with respect to such declaration under the applicable provisions of the Act.

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SUPREME COURT OF THE UNITED STATES.

Nos. 470, 815.—October Term, 1944.

American Power & Light Company, Petitioner, 470 *vs.* Securities and Exchange Commission.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.
Securities and Exchange Commission, Petitioner, 815 *vs.* Samuel Okin.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 4, 1945.]

Mr. Justice Roberts delivered the opinion of the Court.

We granted certiorari in these cases because of an apparent conflict in the decisions below[1] concerning the application of § 24 (a) of the Public Utility Holding Company Act,[2] which provides that "any person or party aggrieved by an order issued by the Commission" under the Act may obtain a review of the order by the Circuit Court of Appeals of the circuit of his residence or principal place of business. The difference of view is as to the scope of the phrase "person or party aggrieved."

In No. 470 it appears that the petitioner is a registered holding company and owns all the common stock of the Florida Power & Light Company. The paragraphs of the order in controversy require Florida to make certain accounting entries which will result in taking out of surplus moneys which would otherwise be available to pay dividends to petitioner. The order including these paragraphs was made as the result of proceedings before the Commission to which American and Florida were parties, and in which American participated; and the provisions in controversy appear to have been drawn with a view that they might be contested apart from other matters before the Commission, and to have included statements to the effect that they were made

[1] American Power & Light Co. *v.* Securities and Exchange Commission, 143 F. 2d 250; Okin *v.* Securities and Exchange Commission, 143 F. 2d 945.

[2] 15 U. S. C. 79x.

without prejudice to the rights of American and Florida to contest them.

American petitioned the court below to set aside the order. Later Florida petitioned another Circuit Court of Appeals to set aside the same paragraph attacked by American. The Commission moved to dismiss American's petition, reciting the fact that Florida had instituted a similar proceeding, and asserting that American, as sole stockholder, had no standing to seek review of the order.

In No. 815 it appears that Electric Bond & Share Company, a registered holding company, loaned $35,000,000 to a subsidiary, American and Foreign Power Company, which is also a registered holding company, and that the question of how this loan should be refinanced became the subject of a proceeding before the Commission.

The respondent Okin, as the owner of 9,000 out of a total of some 5,250,000 common shares of Electric Bond and Share, was allowed to participate in the proceeding, and opposed a proposition which the two companies submitted for method of refinancing the loan. The Commission made an order approving the proposal; and Okin thereupon petitioned the court below to review the order. The gist of his complaint was that the refinancing as approved would reduce the value of his stock by reducing the interest income of Electric Bond and Share.

The Commission, before filing a certified copy of the transcript of the record upon which the order complained of was entered, moved to dismiss Okin's petition upon two grounds. The first was that, within the meaning of § 24(a) Okin was not a person or party aggrieved. The second was that his objection to the order was frivolous. In response to this the court said that, while it might well be that Okin's attack lacked merit, if it did the result should be an affirmance of the order rather than a dismissal of the proceeding, and that jurisdiction to consider the merits was lacking in the absence of a transcript of the proceedings before the Commission. The motion was accordingly denied.

The Commission alleges that subsequently it filed a motion to dismiss or affirm, after having filed an abbreviated transcript containing so much of the record as was relied on for the purposes of the motion, and that this motion was denied without

opinion. The record shows that a motion to dismiss or affirm was denied without opinion.

The Commission asks us to review both denials. The respondent insists we lack jurisdiction so to do, for the reason that neither order is final.

First. We hold that a stockholder having a substantial financial or economic interest distinct from that of the corporation which is directly and adversely affected by an order of the Commission, irrespective of any effect the order may have on the corporation, is a "person aggrieved" within the meaning of Section 24(a).

The Commission does not question that American, as sole stockholder of Florida, has a substantial economic interest which is affected by the order; nor does it maintain that the term "person aggrieved" is not broad enough to include one whose economic interest is affected by an order affecting his company under circumstances which make it inequitable that he be bound by the action or inaction of the management. It insists, however, that American's application for review in the court below was in the nature of a derivative action, commonly designated a stockholder's suit, to redress a wrong to his corporation. In this view, the Commission urges that, as Florida has itself sought a review of the order, it must be presumed that Florida will endeavor to protect the interest of its sole stockholder, American, and that American has consequently failed to show any necessity for its representing the interests of Florida.

The difficulty with this contention is that the action of the Commission in ordering the transfer of an item from surplus account to another account where the item will not be available for the payment of dividends does not deprive the corporation of any asset or adversely affect the conduct of its business in the manner it affects the petitioner, whereas the order has a direct adverse affect upon American as a stockholder entitled to dividends. It was because the court below overlooked this difference that it found support for its decision in *Pittsburgh & West Virginia Railway Co.* v. *United States*, 281 U. S. 479. That was a suit brought under the Urgent Deficiencies Act to set aside an order of the Interstate Commerce Commission addressed to a carrier other than the plaintiff in the suit. The plaintiff was a minority stockholder of the carrier affected. This court pointed

out that, under the accepted doctrine, the plaintiff had no standing to sue since in attempting to do so it was merely seeking in a derivative capacity, to vindicate the rights of the corporation.

In awarding a review of an administrative proceeding Congress has power to formulate the conditions under which resort to the courts may be had.[3] The persons accorded a right to obtain review are, therefore, to be ascertained from the terms of the statute. Congress might here have provided that only parties to the administrative proceeding should have standing to obtain court review. When the bill which became the Public Utility Holding Company Act was introduced in the houses of Congress it provided that "any person aggrieved by an order issued by the Commission in a proceeding under this title *to which such person is a party* may obtain a review of such order."[4] The provision was altered so as to read as it is now found in the statute. There seems to be no reason not to accord the statutory language its natural meaning in a case such as this, where the considerations which would move the corporation to seek review differ from those which may be relevant to the stockholder's interests. There may be situations in which the two interests are the same and where consequently the grievance ought not to support two proceedings identical in character. This, however, is not such a case; for it is possible that without any legal wrong to stockholders the corporation may elect not to prosecute, or to abandon, a proceeding for review.

This court has not allowed the usual criteria of standing to sue to deny persons who, in analogous cases under that doctrine, would ordinarily not be permitted to invoke court review, the benefit of such review under statutes embodying the same language as § 24(a).[5] The same is true of the lower federal courts.[6] In these instances the extension of the privilege to persons aggrieved was held to extend it to those not technically parties, and, therefore, not entitled, without the statutory provision, to initiate litigation in a court.

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[3] Federal Power Comm. v. Pacific Power & Light Co., 307 U. S. 156, 159.

[4] Senate Bill No. 1725, 74th Cong., 1st Sess., § 24(a); House Resolution No. 5423, 74th Cong., 1st Sess., § 23(a).

[5] Interstate Commerce Commission v. Oregon-Washington R. & N. Co., 288 U. S. 14 (the Interstate Commerce Act); Federal Communications Comm. v. Sanders Bros. Radio Station, 309 U. S. 470 (Communications Act); cf. L. Singer & Sons. v. Union Pac. Ry. Co., 311 U. S. 295.

[6] Associated Industries v. Ickes, 134 F. 2d 694 (the Bituminous Coal Act).

While the matter was not specifically mooted, it would seem that, until the instant cases, both the Commission and the courts have been of the view that persons situated as are the stockholders in these cases were given the statutory right to apply for review of a Commission order. In Circuit Courts of Appeals, and in this court, stockholders have been heard upon the merits of orders made against corporations by the Securities and Exchange Commission.[7]

The further suggestion is made that to permit stockholders to resort to court review would create unnecessary inconvenience and expense since a stockholder entitled to apply to a court may go to the Circuit Court of Appeals of the circuit in which he resides or has his principal place of business. Thus, it is urged, the Commission might be called upon to answer suits in various circuits. But § 24(a) provides that the Commission may file a transcript of its proceedings in any circuit in which a proceeding has been initiated and thereupon the court in which the transcript is filed shall have exclusive jurisdiction. Thus, if the Commission had here elected to file a transcript in the Circuit Court of Appeals where Florida applied for review, the Circuit Court of Appeals for the First Circuit, in which American's petition was filed, should have transferred that petition to the other court and all the complaints would have been heard by a single court and on the same record.[8]

Second. In No. 815, the court below held the respondent had standing to maintain the proceeding for review of the Commission's order. In this case, Okin, as a stockholder, attacked the transaction made by his company with its subsidiary on the grounds that it was both illegal and fraudulent. His corporation urged that the Commission approve the transaction thus taking a position adverse to him. His application for review of the Commission's order approving the settlement was, therefore, in the nature of a derivative or stockholder's action. Inasmuch as he charged illegality and fraud, it is evident that application to the Board of Directors would have been futile. Under the Com-

[7] Lawrence v. Securities & Exchange Commission, 105 F. 2d 574; Todd v. Securities and Exchange Commission, 137 F. 2d 475; cf. Northwestern Electric Co. v. Federal Power Commission, 321 U. S. 119.

[8] L. J. Marquis & Co. v. Securities and Exchange Commission, 134 F. 2d 335; L. J. Marquis & Co. v. Securities and Exchange Commission, 134 F. 2d 822.

mission's own view, therefore, the Circuit Court of Appeals was right in denying a dismissal of the proceeding for lack of standing on the part of Okin to initiate it. But, as above stated in the decision of No. 470, we do not deem it essential that the proceeding have the character of a derivative suit.

The Commission urges us to hold that the petition on its face presents only frivolous contentions. The court below was unwilling to dismiss on this ground, holding that a more appropriate order would be one of affirmance. It required that the record be filed, as required by the Act, as a condition of consideration of this matter. Apparently it was not satisfied that the filing of an abbreviated transcript furnished a basis for affirmance. The Commission, without inordinate delay or additional expense, might have filed the ~~typewritten~~ transcript of the proceedings before it and obtained the judgment of the court on the adequacy of the petition. We think we are not called upon to examine the merits of the Commission's contentions or to reverse the decision denying the motion to dismiss, or that denying the motion to dismiss or affirm.

In No. 470 the judgment is reversed.

In No. 815 the judgment is affirmed.

Mr. Justice DOUGLAS took no part in the consideration or decision of these cases.

Mr. Justice BLACK and Mr. Justice REED concur in the result in No. 815.

The Court below has discretion to deal with the problem of the necessity of a record, and the extent thereof, in connection with a motion to dismiss or affirm on the ground that the petition for review is frivolous.

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[June 4, 1945.]

Mr. Justice Murphy, dissenting.

Fifteen years ago this Court was confronted with an attempt by a corporate stockholder to set aside an order of the Interstate Commerce Commission on the claim that the order threatened the financial stability of the corporation to which it was directed as well as the "appellant's financial interest as a minority stockholder." The Court, speaking through Mr. Justice Brandeis, held that the stockholder had no standing to maintain the suit since "the order under attack does not deal with the interests of investors" and the only injury feared "is the indirect harm which may result to every stockholder from harm to the corporation." *Pittsburgh & West Virginia Ry. Co.* v. *United States*, 281 U. S. 479, 487. That holding, in my estimation, disposes of this attempt by the American Power & Light Company to obtain an independent judicial review of an order of the Securities and Exchange Commission directed at a company in which it is the sole stockholder.

Section 24(a) of the Public Utility Holding Company Act allows "any person or party aggrieved by an order issued by the Commission" to obtain a review of such order in an appropriate Circuit Court of Appeals. The test, then, is whether American was "aggrieved" by the Commission's order in this instance. Since the term "person or party aggrieved" is not defined in the Act we can only assume that its meaning is to be drawn from

traditional legal principles and from any relevant statutory policies.

Only two paragraphs of the Commission's order are in issue. They are directed solely to the Florida Power & Light Company, all of whose securities are owned by American. These paragraphs fail even to mention American; they neither require nor prohibit any action by it. Nor do they in any way affect American's rights as a stockholder. They simply require Florida to make certain accounting adjustments in the form of charges to earned surplus. Since dividends are paid from earned surplus and since these requirements will decrease the earned surplus account, the Court reasons that "the order has a direct adverse effect upon American as a stockholder entitled to dividends." From this it is concluded that American is "aggrieved" by the order. To that reasoning and conclusion I cannot agree.

1. There is no evidence in the record to justify the assumption that the items to be charged to surplus would necessarily have been available for distribution as dividends to American or that the surplus was otherwise inadequate to pay the normal amount of dividends. Florida might well have retained these items for reinvestment in the business, thus making them unavailable for dividend distribution. Moreover, to the extent that Florida retains these items in its capital structure, American's ultimate equity in the organization is increased. It cannot be said, therefore, that American has been adversely and permanently affected by this order.

2. But even if it were clear that the order would necessarily restrict dividend payments it does not follow that the restraint so directly affects American as to entitle it to challenge the order as a person "aggrieved." It has long been established that ordinarily the mere accumulation of an adequate surplus does not entitle a stockholder to dividends until the directors, in their discretion, declare them. *Southern Pacific Co.* v. *Lowe*, 247 U. S. 330. And until such a declaration is made the directors are free to deal with that surplus in good faith as they may see fit in the exercise of their business judgment, the stockholders not having sufficient interest in undeclared or potential dividends to challenge such action. See *Wabash Ry. Co.* v. *Barclay*, 280 U. S. 197. The stockholders' interest in such matters, in other words, is indistinct

from that of the corporation prior to an actual declaration. Thus if the Florida management had made the same accounting adjustments as those ordered by the Commission in this case American would not be sufficiently "aggrieved" to attempt to prevent Florida from making such adjustments, even though dividend payments might be adversely affected. No adequate reason is evident from the facts or from the opinion of this Court as to why American is any more directly or adversely "aggrieved" when the accounting adjustments are ordered by the Commission rather than by Florida's management or as to why any different results should follow. The impact of the adjustments in either instance is presumably to strengthen the financial structure of Florida; that they may have the incidental effect of decreasing dividends temporarily has never heretofore been sufficient to entitle a stockholder to challenge the adjustments.

3. The fact that American is trying to appeal an administrative order rather than to institute an original action against Florida's management is irrelevant under the circumstances. The Commission's order does not deal with the rights of stockholders as such, in which case a stockholder clearly could appeal from the order. *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80; *Lawless* v. *Securities and Exchange Commission*, 105 F. 2d 574; *New York Trust Company* v. *Securities and Exchange Commission*, 131 F. 2d 274; *City National Bank & Trust Co.* v. *Securities and Exchange Commission*, 134 F. 2d 65. See also *Otis & Co.* v. *Securities and Exchange Commission*, 323 U. S. 624. Nor is there any charge of fraud or breach of duty on the part of Florida, from which it could be argued that American should be given the right to appeal since Florida might not act to protect American's legitimate interests. Indeed, such a possibility is expressly negatived by the fact that Florida has already appealed the Commission's order to another court and is urging precisely the same considerations that American seeks to present in this proceeding. In view of American's complete control of Florida through stock ownership there is no danger of conflicting interests arising between the two companies in the other proceeding. There is thus no basis for concluding that the economic interest asserted by American cannot or will not be adequately protected by Florida. Cf. *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470; *Associated Industries*,

Inc. v. *Ickes*, 134 F. 2d 694, dismissed as moot, 320 U. S. 707. The inevitable logic of the facts of this case leads straight back to the conclusion that American's grievance is only "the indirect harm which may result to every stockholder from harm to the corporation." *Pittsburgh & West. Virginia Ry. Co.* v. *United States*, *supra*, 487. That conclusion calls for a dismissal of American's attempted appeal from the Commission's order just as it would call for a dismissal of any suit brought by American against Florida on these facts.

4. The Court's conclusion here leads only to unfortunate consequences in the judicial review of administrative orders. If the remote economic interest asserted by American is sufficient to institute a review proceeding such as this there is no limit to which minority stockholders may harass the Commission and their respective corporations by challenging orders of the Commission directed to the corporations. It is no answer that Section 24(a) gives exclusive jurisdiction to the court in which the Commission files the transcript of a particular proceeding. That provision clearly envisages two or more appeals in different courts by persons who are legally "aggrieved" by a Commission order and who can obtain adequate relief only by individual appeals. But under this decision stockholders are now free, whenever they feel that their potential dividends are affected by Commission action directed to the corporation's accounting entries against which dividends are charged; to appeal regardless of the management's wishes in the matter and regardless of the management's ability to protect their interests fully and fairly. Stockholders in effect supplant the management in deciding whether to appeal from administrative action affecting such internal accounting procedure of the corporation, a problem which until now was exclusively and properly within the domain of the corporate directors and officers. Many stockholders are not in a position to know the intricacies of modern corporate accounting or the proper attitude to take, from the corporation's point of view, as to the challenged administrative action. But now they have been given carte blanche to proceed as they desire. It is difficult to believe that Congress intended such consequences to flow from its use of the word "aggrieved" in Section 24(a).

Finally, I dissent from the Court's disposition of the writ in the *Okin* case. It is no doubt true, as the Court states, that an

assertion that a transaction approved by the Commission was fraudulently entered into by the corporation is sufficient to entitle the stockholder to an independent review of the Commission's action. But it does not follow that the mere cry of "fraud" is sufficient. There must be some bona fide basis appearing on the face of so serious a charge. Here, however, Okin merely charges that (1) a Maine corporation is not subject to the Commission's jurisdiction because its subsidiaries operate outside the United States; (2) the particular transaction in issue is detrimental to Okin's interests as a stockholder inasmuch as the management extended a note of a subsidiary at a reduced interest rate; (3) various corporate officers held conversations with each other and with members of the Commission's staff; (4) his constitutional rights have been invaded; and (5) the transaction is void for failure to comply with Section 20 of the New York Stock Corporation Law. Such frivolous claims of fraud are insufficient to warrant making an exception to the general rule that a stockholder cannot appeal an administrative order which involves only the corporation as such.

Mr. Justice BLACK and Mr. Justice REED join in that part of this dissent dealing with No. 470, the *American Power & Light Co.* case.